No. 75-1476

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

THE ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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APPENDIX TO JURISDICTIONAL STATEMENT

April 13, 1976

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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APPENDIX TO JURISDICTIONAL STATEMENT

APPENDIX A

STATUTES INVOLVED

Administrative Procedure Act, § 8, as amended (5 U.S.C. § 557)

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554 (d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

Interstate Commerce Act, § 15(7), as amended
(49 U.S.C. § 15(7))

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such

rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 75-201

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

Before VAN DUSEN, Circuit Judge, and WEINER and GORBEY, District Judges

WEINER, J. NOVEMBER 24, 1975

This is an action brought by several railroad companies to set aside an order of the Interstate Commerce Commission (I.C.C.) cancelling proposed rate schedules which would have provided increased revenues from the transportation of fresh fruit and vegetables to the east coast. Jurisdiction of this court was invoked pursuant to 28 U.S.C. § 1336(a) and a three-judge court was convened as required by 28 U.S.C. § 2325. Numerous shippers and growers have joined this action as intervening defendants.

Briefly summarized. the facts are as follows. In May, 1974, the railroads filed a series of tarffs and rate schedules with the I.C.C., which tariffs were to replace then-existing tariffs covering the transportation of perishable food products. Subsequently, protests were lodged by shippers and receivers, and the newly-filed tariffs were suspended and hearings begun pursuant to 49 U.S.C. § 15(7). The hearings constituted Investigation and Suspension Docket No. 8944, *Fresh Fruits and Vegetables, Trans-Continental and Western Points.* Hearings were held across

the country at various places and at times until December 20, 1974. On December 20, the presiding administrative law judge set February 3, 1975 as the date by which briefs were to be submitted by the interested parties.

On December 30, 1974, the date on which the seven-months period of suspension of rates under investigation was to end, the Full Commission issued an order cancelling the rates, effective thirty days later. As the railroads had not voluntarily agreed to prolong the suspension,[1] adherence to the previously-set briefing schedule would have resulted in the new tariffs being effective until the I.C.C. rendered its decision. The I.C.C. order indicated that the Commission had dispensed with the necessity of issuing an initial decision because of the need for a timely final decision and the I.C.C. had found that the filing of briefs was, in light of their findings "not necessary for a proper disposition of [the] proceeding." A report was issued on March 14, 1975, which fully explained the basis for the December 30, order.

The railroads came before this court seeking a temporary restraining order to prohibit the Defendants ". . . from enforcing by any manner or means the order of the Interstate Commerce Commission entered . . . on December 30, 1974." Their request was denied on January 27, 1975. The matter is now before the court for final determination.

In their briefs, the railroads have presented several reasons why the I.C.C. order should be set aside. Their

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[1] A number of the shippers unsuccessfully petitioned the I.C.C. to strike the new rates prior to the expiration of the period of suspension. The I.C.C. supported a motion by the shippers to obtain a temporary restraining order against the implementations of certain new rates by the railroads. This motion was denied by the United States District Court in Chicago on December 30, 1974. Blue Chip Inc. v. Western Trunk Line Committee, et al., No. 74C 3758 (N.D. Ill. 1974).

principal contention is that the failure to allow them to submit briefs violated the Administrative Procedure Act (A.P.A.), 5 U.S.C. § 551 *et seq.*, and violated their right to due process of law under the Fifth Amendment. Plaintiffs argue that under § 557(c) of the A.P.A., the I.C.C. was required to allow the parties to submit briefs and arguments. Specifically, § 557(c) provides:

> Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—
>
> (1) proposed findings and conclusions, or
>
> (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
>
> (3) supporting reasons for the exceptions or proposed findings.

Defendants' briefs state that the hearings conducted by the I.C.C. provided plaintiffs with ample opportunity to present their position and, in fact, plaintiffs did fully present their position through their exhibits. Defendants also argue that the thirty day period before the December 30 order was to be effective afforded plaintiffs the opportunity to submit proposed findings and supporting reasons in the form of a motion for reconsideration.[2] The United States and the I.C.C. further state that the more rigorous standards of § 557 are not applicable, but, rather, that § 553 of the A.P.A. governs investigation and suspension proceedings.

[2] Plaintiffs did, in fact, file a motion for reconsideration. However, that motion was not directed at the merits of the I.C.C. findings, but rather was directed at the procedural claims raised here.

Section 553 applies generally to rule making proceedings and provides:

> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

The government contends that § 15(7) of the Interstate Commerce Act requires only that decisions in investigation and suspension proceedings be made after "full hearing" (49 U.S.C. § 15(7)), and that the requirement has been satisfied.

It is clear that, if § 553 applies to the I.C.C. proceedings and not § 557, the hearings held by the I.C.C. would satisfy all statutory requirements. However, the issue raised by the parties is whether this proceeding was one in which rules were required to be made "*on the record* after opportunity for an agency hearing" (5 U.S.C. § 553(c), emphasis added). Plaintiffs claim that under 49 U.S.C. § 14(1), findings and conclusions must be made in a more specific form than they were made by the I.C.C., because, they contend that § 557 of the A.P.A. governs rate-making by the I.C.C.

There is support for the government's contention that these proceedings are governed by § 553 of the A.P.A. and that § 557 is not applicable here.[3] However, it is not neces-

[3] In *Students Challenging Regulatory Agency Procedures* (S.C.R.A.P.) v. *United States*, 371 F. Supp. 1291 (D. D.C. 1974), it was stated:

> Rate-making, involving basically legislative type judgments,

sary for us to decide this question. Even if we assume that § 557 applies, the proceedings before the I.C.C. meet the statutory requirements of the A.P.A.

Section 557(b) provides:

> When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—
>
> (2) this procedure may be omitted in a case which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

The Administrative Law Judge had set February 3, 1975 as the date by which briefs were to be submitted by the parties. However, under the above-quoted portion of § 557 (b), it was imperative that the I.C.C. reach its decision by December 30, 1974, the date on which the seven-months suspension period ended. The I.C.C. did so by order dated December 30, 1974 and subsequently, on March 14, 1975, issued its full opinion. It is uncontested that all parties were well aware of the fact that the I.C.C. would have to act by December 30, 1974, if the published rates were to be suspended.[4]

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is a form of rule-making which is governed by section 553, rather than Sections 556 or 557, of the A.P.A. Id. at 1306.

Cf. Aberdeen & Rockfish RR. Co., et al. v. *SCRAP,* —— U.S. —— (p. 11 of slip opinion of 6/24/75; Nos. 73-1966 & 73-1971); *Virgin Islands Hotel Ass'n* v. *Virgin Islands W. & P. Authy.*, 476 F. 2d 1263, 1268-69 (3d Cir. 1973).

[4] In fact, many of the shippers filed petitions with the I.C.C. prior to December 30, 1974, to secure suspension of the rates. Although all of the petitions except one, that of Bud Antle, had been denied, the Antle petition was apparently still pending when the suspension order of December 30 was entered.

Plaintiffs have objected to the fact that an initial order was entered on December 30, 1974, and that the full decision of the I.C.C. was not entered until March 14, 1975, thereby depriving them of information necessary to prepare revised tariffs for submission to the I.C.C. However, during that interim period, plaintiffs did, in fact, file a petition with the I.C.C. This petition to vacate the I.C.C. order was in the format of a brief and contained arguments regarding the proposed rates. It would seem that the I.C.C. afforded plaintiffs every reasonable opportunity to be heard, and certainly the record amassed in the proceedings of 5,636 pages of transcript and 200 exhibits attests to that fact. The full opinion of the I.C.C. consists of 25 pages of text and 43 pages of Appendices, and it seems clear that the statutory requirements of the A.P.A., even under § 557(c) of . . . "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record . . ." have been met. Plaintiffs also contend that 49 U.S.C. § 14(1) requires that findings and conclusions be in a more specific form than they were before the I.C.C. That Section requires only that the report of the Commission state its conclusions, together with its decision and order. And, under 49 U.S.C. § 15(7) which governs rate suspension proceedings, the Commission is required:

> . . . after full hearing, whether completed before or after the rate . . . goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective.

The record evidences the fact that a full hearing was afforded the parties. In *Alabama G.S.R. Co.* v. *United States,* 340 U.S. 216, 227-228 (1950) the Supreme Court stated that § 14(1) does not require detailed findings of fact, but rather only the essential basis of the Commission's judgment. And in *Kenny* v. *United States,* 103 F. Supp. 971 (D. N.J. 1952),

the court held that § 15(7) of the Interstate Commerce Act requires:

> . . . that the interested parties, both the carrier and protestants, shall be afforded an adequate opportunity to be heard on the merits of the controversy; nothing more would seem to be required. Id. at 977.

There has, likewise, been no failure to afford plaintiffs due process of law in accordance with the requirements of the Fifth Amendment to the Constitution of the United States. The parties were, as the record shows, accorded a full and fair hearing and, the Commission acted speedily in issuing its December 30 order because it was apparently concerned that allowing the new rates to go into effect for any length of time would significantly disrupt the produce traffic.[5] Thereafter on March 14, 1975, the full opinion of the I.C.C. issued. Under 49 U.S.C. § 15(2), orders of the I.C.C. regarding rates are to take effect not less than 30 days after their issuance. Therefore, had the Commission not acted with regard for the potential disruptive effect of the new rates, and issued only its final opinion on March 14, 1975, the rates could not have been suspended until April 14, 1975, and would have been effective for three and one-half months, clearly an undesirable result.

We find the contention of plaintiffs that refunds are not appropriate in this situation to be without merit. Section 15(7) of the Interstate Commerce Act, states:

> . . . upon completion of the hearing and decision [the Commission] may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portions of such increased rates or charges as by its decision shall be found not justified.

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[5] There was evidence submitted by suppliers that in fact the produce traffic was severely disrupted during the 30 day period before the effective date of the I.C.C. order.

Section 15(7) further provides that the burden of proving proposed new rates to be just and reasonable is on the carrier. Therefore, it is altogether reasonable for the I.C.C., after finding that the requested rates are not just and reasonable, to order the carrier to refund any monies collected as part of the increased rates under investigation. Plaintiffs, in briefs, use the word "reparations", which appears in § 13(1) of the Interstate Commerce Act, a section dealing with complaints to and investigations by the Commission of violations of law by carriers. This matter is concerned with § 15 of the Act, and, more specifically, § 15(7) which section deals not with rates which are in use by carriers, but rather with proposed new rates. Here, the Commission's Order which found the rates not to be just and reasonable was issued December 30, 1974, prior to the expiration of the seven-months suspension period. It is within the Commission's power to further order that any charges paid pursuant to the new rates be refunded, with interest.

For the foregoing reasons, judgment will be entered for the defendants by separate order also dismissing the Complaint and affirming the December 30, 1974, order of the Interstate Commerce Commission.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 75-201

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

Order

The Order of the Interstate Commerce Commission is hereby AFFIRMED.

The complaint filed by plaintiffs is dismissed and judgment is hereby entered in favor of defendants.

IT IS SO ORDERED.

/s/ FRANCIS L. VAN DUSEN
Francis L. Van Dusen

/s/ CHARLES R. WEINER
Charles R. Weiner

/s/ JAMES H. GORBEY
James H. Gorbey

Filed November 24, 1975.
JOHN J. HARDING, *Clerk*
By ..... *D. Clerk*

APPENDIX C

ICC's Decision and Order of December 30, 1974

2530

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 30th day of December, 1974.

GEORGE M. STAFFORD, ALFRED T. MACFARLAND, KENNETH H. TUGGLE, WILLARD DEASON, DALE W. HARDIN, ROBERT C. GRESHAM, A. DANIEL O'NEAL, CHARLES L. CLAPP, Commissioners.

FRESH FRUITS & VEGETABLES, TRANSCONTINENTAL & WESTERN POINTS I. & S. No 8944*

A decision and order in the above-entitled proceeding, approved and adopted.

Decision and Order

[Service Date Dec. 30, 1974]

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 30th day of December, 1974.

INVESTIGATION AND SUSPENSION DOCKET NO. 8944[1]

FRESH FRUITS & VEGETABLES, TRANSCONTINENTAL & WESTERN POINTS

It appearing, That by order of May 28, 1974, the Commission instituted an investigation into and concerning tariff schedules setting forth new increased rates and charges and new rules, regulations and practices affecting

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* Also embraces Fourth Section Application No. 42830, Fruits and Vegetables from and to Colorado and Utah Points.

[1] This order also embraces Fourth Section Application No. 42830, Fruits and Vegetables From and to Colorado and Utah Points.

such rates and charges, applicable on fresh fruits and vegetables, including onions and potatoes, applying generally on carload movements within the west and between the west and the east and south;

It further appearing, That a hearing commencing in Washington, D.C., on September 9, 1974, and subsequently continued in San Francisco, Calif., Washington, D.C., and Dallas, Tex. has been held, and that the extensive evidence adduced has been considered;

It further appearing, That respondents have supported the proposed rates by cost data designed to show that the existing rates are unduly depressed, and that the proposed rates are not excessive, and that primary reliance is placed on cost data based on current depreciation and capital costs of mechanical refrigerator equipment and locomotives;

It further appearing, That protestants have adduced evidence tending to show that: (1) the proposed rates, which represent increases as high as 132 percent over present rates, will seriously disrupt the marketing of fresh fruits and vegetables, will largely eliminate the railroads as a feasible mode of transportation thereof, and will endanger the availability of these commodities, which are indispensable for a sound nutritional diet, for large segments of the Nation's population; (2) certain of the proposed rates are subject to rules providing for penalty payments for late deliveries, while other rates on traffic from similar origins to the same destinations are not subject to such provisions; (3) the rates are not subject to minimum weights appropriate for smaller rail cars and to the tariff circular rule generally known as Rule 66 providing that charges based on a car ordered apply when a larger car is furnished by the carrier; and (4) the proposed TOFC rates are not reasonably related to the proposed carload rates and are excessive;

We find, That due and timely execution of our functions under section 15(7) of the Interstate Commerce Act imperatively requires the omission of an initial decision.

We further find, That this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

We further find, That the respondents have not shown the proposed rates to be just and reasonable for the following reasons:

(1) The theory of replacement costs of equipment is invalid, particularly for mechanical refrigerator cars, since much of the movement of these commodities occurs in nonmechanical refrigerator cars. Furthermore, the entire theory of replacement costs is a corollary of reproduction value theory used in calculating a fair return on property devoted to transportation, a concept not heretofore accepted by the Commission, and should not be adopted with respect to only one category of freight. The cost data adduced which is not based on the described replacement cost theory does not support the proposed rates. The rates would exceed traditionally computed variable and fully distributed costs by wide margins in many instances, which is excessive for the traffic involved (see appendix);

(2) The proposed rates would largely eliminate the use of railroad transportation on many of the considered commodities with extreme hardship on the producers and consumers of such commodities;

(3) The proposed TOFC rates are not shown to be reasonably related to the proposed carload rates;

(4) Certain of the proposed rates are violations of the outstanding order of the Commission in *Washing-*

ton Potato & Onion Shippers Assn., Inc. v. *U.P.R. Co.*, 300 I.C.C. 537;

(5) The proposed penalty rule does not apply uniformly to all similar movements;

(6) Insufficient justification for Fourth Section departures in Fourth Section Application No. 42830 has been presented.

And we further find, That in view of the above findings, which will be more fully explained in a report to be issued shortly, the filing of briefs is not necessary for a proper disposition of this proceeding.

Wherefore:

It is ordered, That respondents be, and they are hereby, required to cancel the proposed schedules upon not less than one day's notice within 30 days after the service date of this order.

By the Commission.

ROBERT L. OSWALD
Secretary

(SEAL)

APPENDIX

Showing revenue/cost relationships developed by respondents when costs are computed without the contended for current capital and equipment costs.

Commodity#	Range of Variable Rate/Cost Ratios*
Vegetables and Melons other than carrots, etc. from Imperial Valley and related origins	1.276 - 1.478
Carrots, etc. from Imperial Valley and related origins	1.389 - 1.544
Light Loading Vegetables	1.298 - 1.541
Citrus Fruits	1.269 - 1.506
Deciduous Fruits	1.111 - 1.378
Carrots, onions, potatoes	1.354 - 1.585
Potatoes	1.324 - 1.514
Potatoes	1.085 - 1.446
Potatoes, Idaho	1.188 - 1.566

#Categories of traffic used by respondents
*Average for all weight brackets

APPENDIX D

ICC's Supplemental Report and Order (Served March 14, 1975)

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 8944[1]

FRESH FRUITS & VEGETABLES, TRANSCONTINENTAL & WESTERN POINTS

Decided December 30, 1974
Service Date: March 14, 1975

Proposed increased rail rates on fresh fruits and vegetables within west, and between west, east and south found not shown to be just and reasonable. Schedules ordered canceled and proceeding discontinued.

W. Donald Boe, Donald A. Brinkworth, Leland E. Butler, Richard S. M. Emrich, III, Eric C. Paul, John J. Paylor, Richard J. Schreiber and *John MacDonald Smith* for respondents.

Eugene D. Anderson, William J. Augello, Frank C. Brooks, Donald G. Dressler, Ernest Falk, Jeffrey Lee Guttero, E. J. Hanson, Richard Harrington, Ronald K. Kolins, Dickson R. Loos, Thomas F. McFarland, Jr., Richard D. Maltzman, Larry D. Ripley, Murray S. Simpson and *Fred H. Tolan* for protestants.

Clinton E. Jeffers for Colorado Department of Agriculture.

George H. Morin for North Dakota Public Service Commission.

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[1] This report also embraces Fourth Section Application No. 42830, Fruits and Vegetables From and To Colorado and Utah Points.

Report and Order of the Commission

BY THE COMMISSION:

By schedules filed to become effective on May 31, 1974, and later, the respondent railroads operating throughout the United States published increased rates on fresh fruits and vegetables as more fully described in Appendix B of this report. Upon protest by numerous interests the proposed schedules were suspended until December 30, 1974, when they became effective. Hearings thereon were held in Washington, D.C. from September 9 to 13, 1974, in San Francisco, Cal. from October 16 to November 1, 1974, in Washington, D.C. from November 11 to 20, 1974, in Dallas, Tex. from December 9 to 11, 1974 and in Washington, D.C. from December 16 to 20, 1974. The record consists of 5,636 pages of transcript and nearly 200 exhibits. On December 30, 1974, upon concluding that respondents had not sustained their burden of proof to show that the proposed rates were just and reasonable, we issued a decision and order requiring the rates to be canceled within 30 days. That decision and order, included here as Appendix A, indicated that the findings made therein would be more fully explained in a subsequent report. On January 27, 1975, in Atchison, Topeka & Santa Fe Ry. Co., et al. v. United States and Interstate Commerce Commission, C.A. No. 75-201, (U.S.D.C.,E.D.Pa.) a motion by the railroads to temporarily restrain the order was denied. The rates which became effective on December 31, 1974, and were ordered cancelled within 30 days, will be referred to in this report as the proposed rates.

The decision and order listed six numbered reasons for our finding that respondents had failed to sustain their burden of proof in this proceeding. These reasons are explained *seriatim* immediately below. The affected traffic, its origins and destinations, markets, present and proposed rates, contentions of parties, and other matters are discussed in Appendix B. Our analysis of the cost evidence

presented by respondents and protestants appears in Appendix C.

Costs. The first reason for our burden of proof finding in the decision and order is that the costs offered in support of the proposed rates are invalidly computed. Those costs were developed generally in accordance with this Commission's Rail Form A formula. However, two significant departures from that formula were made. First, depreciation for mechanical refrigerator cars and locomotives was adjusted to reflect current purchase costs of such equipment. Second, the cost of capital was increased to 13 percent for application to the current purchase costs of the same equipment. (On TOFC equipment, a 10-percent cost of capital was used. On the study of movements from Texas, a 13-percent cost of capital was applied to cars only.)

To make these adjustments, the depreciation and capital costs applicable under Rail Form A were removed from the studies and costs reflecting the described adjustments were added. In arriving at the 13 percent cost of capital, a debt cost of 9 percent, the approximate interest on recent equipment trust certificate issues, and a current equity cost of 14.65 percent, calculated from the dividend and price performance of Southern Pacific Transportation Company (SP) stock, were used. From SP's capital structure of 34.2 percent debt and 65.8 percent equity, a cost of capital of 11.15 percent was derived. To this was added approximately 2 percent as a risk premium, resulting in the applied 13 percent cost of capital. It was determined that an annual cash flow of $154 for cars (with a 25-year life) and $174 for locomotives (with a 15-year life), for each $1000. invested, was required to recover depreciation and the 13-percent return after taxes.

Using a current price for a 50-foot mechanical car without the refrigerator unit, of $38,400., and the required cash flow of $154. per $1,000. investment, an annual cash flow of $5,914. for each car was derived. A similar procedure was

followed for locomotives, except in the Texas study. These required cash flows were substituted for the capital costs and depreciation required by Rail Form A. The latter bases depreciation for equipment on original costs, and calculates cost of capital from current costs of existing debt, imputing such debt costs to equity. The original cost of the most recently acquired mechanical refrigerator cars was $25,568. Current embedded debt cost is about 5 percent. Although costs without those adjustments were developed and introduced into the record by respondents, they do not contend that such costs would support the level of rates here proposed, though they do argue that such unadjusted costs demonstrate the depressed level of the present rates.[2]

The following table, showing the present and proposed rates, at the Ex Parte No. 303-A level, the variable costs, as computed by respondents and percentage relationship of costs to proposed rates, with and without the described adjustments, on movements of vegetables, including lettuce, from the west coast to New York, N.Y., illustrates the effect of the adjustments.

(1) Hundred-Weight	(2) Present# Rates	(3) Proposed Rates	(4) Variable Costs	(5) Percent (3) of (4)	(6) "Adjusted" Variable Costs	(7) Percent (3) of (6)
400	311	591	430	137	594	99
500	329	499	357	140	480	102
600	325	429	307	140	419	102
700	279	394	272	145	369	107
800	244	358	246	146	331	108
900	217	326	226	144	302	108

Per car rates stated in cents per 100 pounds.

[2] Rates and costs are stated in cents per 100 pounds unless otherwise indicated. Protective service charges and costs, under consideration in Ex Parte No. 300, Increases in Charges for Mechanical Protective Service, 1973, pending, are not included in rates and charges shown herein.

It will be observed from Columns 5 and 7 that the proposed rates, measured by respondents' conventionally computed costs, are highly compensatory, but that measured by the adjusted costs, they are only marginally compensatory, except for heavier shipments.

Respondents contend that by using the original cost of equipment as the basis by which depreciation is calculated, the sum of the depreciation accruals will fall far short of meeting the costs of new cars, which will be needed if the railroads are to remain a going concern. They further contend that if the continued operation of the rail system at Rail Form A variable cost levels is required, the railroad industry will simply consume its assets until disaster strikes. Consideration of only current cost levels for capital assets is therefore claimed essential to calculate real-dollar depreciation expenses.

The issues presented have had a long history in regulatory law. The depreciation theory relied on by the railroads in this proceeding was given the status of constitutional doctrine in *United Railways* v. *West,* 280 U.S. 234, 253-254 (1930), where the United States Supreme Court stated:

> One of the items of expense to be ascertained and deducted, is the amount necessary to restore property worn out or impaired, so as continuously to maintain it as nearly as practicable at the same level of efficiency for the public service. The amount set aside periodically for this purpose is the so-called depreciation allowance. Manifestly, this allowance cannot be limited by the original cost, because, if values have advanced, the allowance is not sufficient to maintain the level of efficiency.

Justice Brandeis joined by Justice Holmes, dissented at length from that decision. Justice Stone dissented separately. In *Lindheimer* v. *Illinois Bell Tel. Co.,* 292 U.S. 151,

168-169 (1934), the Court effectually reversed the *West* opinion, by finding that if the amounts charged to depreciation exceed the consumption of capital on a cost basis the rate-payers "are required to provide, in effect, capital contributions, not to make good losses incurred by the utility in the service rendered and thus to keep its investment unimpaired, but to secure additional plant and equipment upon which the utility expects a return."

In *Power Comm'n* v. *Hope Gas Co.,* 320 U.S. 591, 606-607 (1944) the *Lindheimer* finding was approved with the Court stating that by basing annual depreciation on cost, "the utility is made whole and the integrity of its investment maintained. No more is required. We cannot approve the contrary holding of *United Railways Co.* v. *West,* 280 U.S. 234, 253-254."

We recognize that the latter opinions do not proscribe replacement cost depreciation; they merely hold that this method of calculating depreciation is not constitutionally compelled. Thus, it remains a constitutionally *permissible* method, as does the original cost method.

However, we are not presently convinced that original cost depreciation is unsound. The argument that depreciation must be based on replacement costs in order that worn out equipment may be replaced, assumes that depreciation charges are the sole source of funds for investing in new equipment, which is not the case. Moreover, it should be noted that respondents do not propose to segregate the sought depreciation charges into a fund for the purpose of acquiring new equipment for this traffic. In fact they have no present plans to acquire such equipment, and refuse to make any definite commitments for future acquisitions. They insist that sound investment practices dictate that the source and application of funds be completely divorced.

In any event, as our decision and order stated, the replacement cost theory of depreciation is a corollary of

using reproduction costs for valuating carrier investment in property devoted to transportation inasmuch as depreciation charges are deducted from the rate base to account for property consumed. Hence, it would be conceptually inconsistent for depreciation to be calculated on one basis and the rate base valued on another. Rate base valuation and related issues, are presently pending before us in Ex Parte No. 271, *Net Investment-Railroad Rate Base & Rate of Return*, 340 I.C.C. 829; 345 I.C.C. 55 (preliminary reports). We decline to anticipate here the results that may ultimately be reached in that proceeding.

Respondents' application of capital costs to current equipment costs constitutes a partial adoption of reproduction cost rate base theory. Therefore, we also decline to adopt this approach prior to completion of our study of this entire matter in Ex Parte No. 271. In view of our finding that the cost of capital has been applied, under our present position, to improper equipment values, it is not necessary to consider respondents' method of developing capital costs.

Although as indicated, we do not understand respondents to contend that costs, without the rejected adjustments, would support the proposed rates, and we found that such costs were insufficient in the decision and order, we have analyzed their computations generally in Appendix C. As explained there, the cost studies are deficient in several additional matters, including the failure to include in the studies lower car ownership costs and tare weights of the RS cars. These cars are shown to be widely used on potato and onion traffic from many origins. No cost consideration was given to the movements of this traffic in multiple-car or trainload movements though it is evident such movements occur. The rates used are not shown to be representative for the shipments reflected in the cost studies; distances were derived by the weighting of different movements while the rates used were for specific points. Moreover, the 10-percent rate increase granted in Ex Parte No. 305 was not reflected in the rate comparisons. We conclude that neither respondents' costs, adjusted to reflect equipment replacement costs, nor its conveniently computed costs, support the rates proposed.

Disregarding the other deficiencies in respondents' studies, if rate-cost comparisons were made at the increased Ex Parte No. 305 rate level, the existing rates would exceed respondents' conventionally computed costs in 90 percent of the comparisons contained in respondents' principal exhibit. In view of our finding that these costs are deficient and somewhat overstated, we cannot accept respondents' contention that the railroads are suffering massive revenue losses on this traffic.

Diverson to trucking. Hardship on producers and consumers. The second reason for the stated finding of the decision and order is that the proposed rates would largely eliminate the use of railroad transportation on many of the considered commodities with extreme hardship on the producers and consumers of such commodities. That transportation of much of this traffic by railroad has, even at existing rates, been rapidly diverting to trucks is documented at some length in Appendix B. It seems evident to us that rate increases such as proposed here will complete the process for many commodities. On the North Dakota potato traffic there is a history of previous diversion to truck, which has been stemmed by rail rate adjustments. On transcontinental shipments from the Pacific Northwest there has been recent increases in trucking volume. California shipments of deciduous fruits, and Texas shipments of nearly all fresh fruits and vegetables, will, judged by recent trends, be diverted to trucking, if transported at all. On Colorado potatoes, where the trend has been toward increased rail transportation, the un-

equivocal testimony is that little of the traffic will move by rail under the proposed rates.

The exempt truck rates are frequently higher than the rail rates; diversion occurs because of service differences. The evidence on exempt trucking rates indicates that although these rates do fluctuate with demand and availability of trucks in some areas, to a large extent they have been stabilized by agreement of all parties concerned. Published schedules, developed through consultation among truckers, truck brokers, associations of truck brokers, shippers and their associations, are widely circulated and generally accepted by shippers and truckers. Ordinarily, the schedules are changed only once a year. Shippers find their best interests are served by stable rates rather than by bargaining over charges for each movement.

Although competition within the exempt trucking industry appears minimal in most origin areas, that industry would undoubtedly respond to the proposed rail rates with increases in its rates since this could be done without adversely affecting its competitive relationship with the railroads. It is also virtually certain that the costs of exempt trucking are increasing, dictating increases in the exempt rates. The railroads presented a study of projected trucking costs for this traffic. Although we have been unable to verify the manner in which this study was developed, it is entirely possible that the costs of these exempt carriers will increase in the amounts shown by respondents.

The ultimate effect of the proposed rates and rising truck costs on the rail-motor competitive situation is impossible to forecast precisely, but the conclusion is inescapable that the truckers will gain a further advantage in handling this traffic that they would not otherwise obtain, if the rail rates are increased as proposed. The position of the railroads on this situation seems one of resig-

nation—if they cannot handle the traffic at the rate level here proposed they would prefer not to handle it on the theory that their resources can be diverted to more lucrative traffic. A principal railroad witness testifying in support of most of the transcontinental rates stated that the proposed rates would not be reduced even if all of the traffic is diverted to motor carriage. A D&RGWR witness testifying on the Colorado potato traffic did indicate some adjustments might be made to certain destinations to hold the traffic to the railroads if a compensatory level of rates could be retained.

The immediate effect of the proposed rates, covering as they do a large portion of the exempt commodities shipped, would likely be a shortage of trucks with consequent rate increases and rate instability. This will impose a hardship on shippers and render difficult orderly and timely marketing of these commodities. There is some evidence of previous truck shortages, in California and Texas, for example, during certain periods.

This would have a detrimental effect on producers. Because of narrow or non-existent profits in vegetable production, a number of producers in Texas have already ceased production of the considered commodities. Other producers are seen by the industry as following if the proposed rates become effective.

The respondents adduced a market study purporting to show that the retail market for fresh fruits and vegetables can without substantial adverse effect absorb the proposed rate increases. We do not find that the data contained in the study supports the conclusions claimed. For instance, the study includes a table comparing *amounts* of increase in unit retail prices from 1964 to July 1974 for various fruits and vegetables in the Chicago and New York markets with *amounts* of increases in rail rates, including those proposed here. Since it is evident that rail rates are included in whole or part in the retail prices it is to be

expected that the *amounts* of increases in the prices, reflecting also all cost increases associated with producing and distributing the commodities, would be greater.

A more meaningful comparison, the relative percentage increases in prices and transportation charges, indicates that if the proposed rates had been effective in July 1974, unit transportation charges would have increased by a higher percentage than prices for all commodities, except potatoes in the New York market, and for three of the six commodities in the Chicago market. Prices on potatoes in July 1974 were higher than present prices.

The contention is made in the study that since retail prices and transportation charges have generally increased at different percentage rates, increases in transportation charges "had nothing to do" with the increased retail prices. To us, this merely indicates that other factors besides freight charges affected the retail prices.

The study indicates that between 1964 and 1973 the per capita consumption of lettuce in the United States increased 12.0 percent. In 1964 the rail transportation charge was 14.8 percent of the unit retail price in New York. In 1973 the corresponding percent was 12.5. This data is used to support the contention that freight rates do not affect consumption or retail prices. The study shows, however, that from 1972 to July 1974 the unit price of lettuce in New York increased from 38.5 cents to 53.7 cents, an increase of about 39 percent in two years. If the proposed rates had been effective in July 1974, transportation charges would have been 17.7 percent of the higher unit retail price, a far greater percentage than shown for any other year in the study period. We cannot conclude from this that the proposed freight charges will not affect retail prices, or that the latter will not affect consumption.

It should be noted that while the study shows an increased per capita consumption of lettuce (12 percent),

tomatoes (2 percent) and celery (14 percent) it shows a decline in affected fresh fruit consumption. Per capita consumption of grapes declined 33 percent, apples, 21 percent, and peaches, 27 percent. The consumption of processed fruits and vegetables increased 26 and 32 percent, respectively.

As shown in Appendix B, the protestants' evidence confirms that the consumption of fresh deciduous fruits and grapes has declined over the years. In this connection, testimony was presented by two nutritionists asserting the importance of fresh fruits, as well as vegetables, in a balanced diet. This testimony, which we deem important and relevant, is here quoted at length:

> "Fruits and vegetables are essential to a nutritionally adequate, well-balanced diet. This group of foods is depended upon to supply practically all of the amount of vitamin C (ascorbic acid) recommended for good health and about two-thirds of the recommended vitamin A value. They are also counted on to contribute to the intake of important minerals and trace elements, as well as to the water and fiber intake. Well handled fresh produce can be expected to have a higher nutritive value than the same produce in processed forms.
>
> "In addition to contributing specific nutrients, fresh fruits are particularly treasured for their flavor, texture and color. They can be served with a minimum of preparation in contrast to the many other and more elaborate menu items, especially salads and desserts. Their consumer acceptability is high.
>
> "Recently USDA made a survey of factors that influenced the acceptance of fruits and vegetables by elementary and high school students. We found that the children accepted fruits more readily than vegetables. They accepted the fresh raw fruits more readily, often objecting to the oversweet heavy syrups of

canned fruits. They rejected fruit that they considered imperfect. The smallest blemish on a piece of fruit could cause complete rejection. They seemed to prefer sweet, bland, and simple flavors as opposed to tart, bitter or complex flavors.

"Fresh fruits have an important place in several types of therapeutic diets. Their special usefulness lies in their high nutritive value as compared to their relatively low calorie value, their high water and fiber content, their low sodium content, their negligible fat content (except for avocados, fruits are virtually fat-free), and their consumer acceptability. Fresh fruits are almost indispensable in well-balanced acceptable diets prescribed for diabetes, weight reduction and control, the prevention and treatment of certain cardiovascular diseases and some abnormal conditions of the lower digestive tract.

"A recently recognized value of fresh fruits and vegetables relates to their fiber content—the portion that is not digested in the human gastrointestinal tract but travels along, giving bulk to the material in the small and large intestine. Diseases of the intestine are much more prevalent in developed countries than in developing countries. Also the incidence in developed countries has increased greatly in the last 40 years. The most important environmental factor likely to affect intestinal function and changes in the cell structure of the lining is the type of food eaten, including the amount of undigested fiber in the diet. The major change in diet that preceded the increase in disease has been the increased use of highly refined foods and the decrease in unabsorbable fiber.

"Surveys have been made of the nutritional value of household food supplies and the food eaten by individual family members. The results have shown that

on the average as many as one-half of the nation's households and many individuals failed to consume the kinds and amounts of foods needed to provide recommended amounts of essential nutrients. Moreover, there has been a downward trend in the quality of diets since 1955. Two of the nutrients most likely to be in short supply are vitamins C and A. For these nutrients, we need to depend heavily on the fruits and vegetables in the diet. There has been a decrease in the purchase and use of these foods. (The decrease amounted to almost 10 percent from 1955 to 1965).

"The quality of diets is related to income and the amount of money spent on foods. As incomes increase, the amount of money spent for food increases and the number of households having good diets increases. High income alone, however, is no assurance of a good diet. In the most recent nationwide survey, it was found that 91 percent of the households with annual incomes of $15,000 or over purchased an average of about 12 (11.9) pounds of fresh fruit per week. In contrast, among households with incomes below $3,000 only 70 percent of them bought fresh fruit and bought less than 5 (4.5) pounds per week.

"Any action that would increase the cost of fresh fruit to the consumer can be expected to reduce the purchases and consumption of fresh fruit, especially by those in the lower and middle income groups. Such reduction would further jeopardize the nutritional adequacy of their diets. Especially hard hit would be retired and other older persons who are generally on fixed and limited incomes, and the children in low income families. Nutritional deficiencies are more frequent in these groups."

We do not believe that the force of this testimony is refuted by evidence adduced by the railroads showing

that frozen and other processed foods contain the same food nutrients as fresh fruits and vegetables.

Despite the foregoing, we agree with the position of the railroads that they should not be expected to render service on this traffic at non-compensatory rates. But we cannot agree that, in view of the described ramifications of discontinued rail transportation of these commodities, that their participation or non-participation in this traffic should be decided by the rate level here proposed. We believe that the railroads, without detriment to their industry, and with great benefit to the producers and consumers of this country, can transport the traffic at rates below those proposed here.

TOFC rates. The third reason for our finding in the decision and order that the burden of proof had not been sustained was that the proposed TOFC rates are not shown to be reasonably related to the proposed carload rates. As our discussion in Appendix B indicates, the respondents propose not only to increase the TOFC rates, but to alter their relationship to the carload rates. This restructuring is stated to be required by the respective costs of the different services. Although we cannot find that a restructuring would not be warranted, upon a proper cost study, we cannot approve the TOFC rates proposed here. As our analysis of the cost evidence in Appendix C indicates, the cost data developed for TOFC service contains the same infirmities previously alluded to with respect to carload service. Thus, there is no basis in this record to support the alleged need for a restructuring of the TOFC rates.

Violations of outstanding order. In *Washington Potato & Onion Shippers Ass'n Inc.* v. *U.P.R. Co.*, 300 I.C.C. 573, we prescribed rate relationships on potatoes between Washington, on the one hand, and Nampa, Idaho and Ontario, Oreg., on the other. Rates on potatoes from eastern Washington to the extent that they were higher by more

than 7 cents, and from western Washington to the extent that they were higher by more than 11 cents, than rates from the named Idaho and Oregon points, were found unduly prejudicial to Washington shippers and unduly preferential of their competitors in Idaho and Oregon. This was the fourth reason for the stated finding.

As shown in the Appendix B discussion of Washington and Idaho traffic neither the present nor proposed rates comply with that finding. The railroads contend that since the present rates do not conform to the order, and the proposed rates for Washington do not exceed the present rate spread over the competitive rates, there is no violation of the outstanding order here. They argue that in any event that order may be modified in this proceeding.

The viability of this Commission's orders rests to a large degree on the good faith compliance by those to whom they are directed. In view of the thousands of rates affected by certain tariff publications, such as those establishing general rate increases, it is manifestly impossible for us to check each rate relationship to determine compliance with outstanding orders. Perhaps, even with good faith efforts to comply with our orders, deviations will unintentionally occur. But to treat existing violations of orders as grounds for their vacation as the railroads suggest here, would largely render all orders nugatory. Thus, entirely apart from the grounds previously discussed, we are unable to approve the affected rates on Washington potato traffic because they are violative of the outstanding order indicated.

Even if there were adequate grounds for vacating that order in this proceeding, and we find no such grounds, there would be serious procedural obstacles to such action. Cf. Nueces County Navigation District, et al. v. United States, et al., Civil Action No. CA-3-4149-C, U.S. D.C. N.D. Tex., Dallas Div. (1973) vacated and remanded as moot by the United States Supreme Court in Chicago Rock Island & Pacific R.R. Co., et al., v. Nueces County Navi-

gation District, et al., No. 73-1217 (1974). In that proceeding the lower court found that an outstanding port equalization order precluded approval of rates allegedly violative of that order.

Penalty Rule. The fifth reason for our burden of proof finding is the uneven application of the proposed penalty rule included within the proposed rates structure. Under that rule the railroads would reimburse consignors or consignees $100. per day up to a maximum of $300., for failure to make delivery in accordance with schedules published in the tariffs. To recover the penalty, claims, accompanied by the paid freight bill, would have to be filed within 30 days of delivery date. If a market decline claim is paid on a shipment such payment would be deducted from any penalty payment on the same shipment, and a penalty payment would be deducted from any market decline claim payment on the same shipment. No penalty payments would be made when delay is caused by any of the following:

(1) Acts of God or public authority.

(2) Strikes, lockouts or other labor disputes.

(3) Heavy or unusual snow accumulation, when resulting in traffic interruption.

(4) Hurricanes, tornadoes or high winds, when resulting in traffic interruption.

(5) Unusual weather conditions, when resulting in traffic interruption.

(6) Accidents, collisions or derailments causing impairment of train operation.

(7) When reduced train speeds are ordered by federal, state or local authority.

Nor would penalty payments be made on shipments stopped in transit for partial unloading or other privileges,

or on shipments diverted or reconsigned, except one administrative diversion would be permitted.

Numerous objections are made to this proposed rule. It is contended that the exceptions virtually nullify the rule by providing grounds for denial of all claims. It is claimed that the scheduled delivery times are to the marshalling yards rather than to actual destinations and thus extend delivery times. It is argued that the provision for offsetting penalty payments against traditional delay payments, and vice-versa, mixes the concepts of freight charges and damages for delay. Finally, objection is made to its uneven application. It applies only to shipments originating in California, Arizona and portions of Oregon, and does not apply on shipments originating in Colorado, Idaho, North Dakota, other portions of Oregon, Texas and Washington, and applies only to shipments delivered to stations on the Penn Central Transportation Company (PC) and the Norfolk and Western Railway Company (NW). Thus, certain railroads participate in the proposed rates, but not the penalty rule. This uneven application of the rule would preclude our approval of the proposed rates even if the rates were otherwise shown to be reasonable.

Fourth section relief. In Fourth Section Application No. 42830, permission is sought to depart from the long-and-short haul provision of section 4 of the act on movements of fresh fruits and vegetables between points in Colorado and Utah, on the one hand, and points in official, southern, southwestern, and western trunk line territories, on the other. The requested relief was withheld by the Commission's Suspension and Fourth Section Board until entry of an order after hearing in the lead proceeding, where the lawfulness of the rates sought to be established is in issue. In view of our finding that the lawfulness of the rates has not been established under other provisions of the act there are no grounds for granting the requested fourth section relief and it was accordingly denied in the

decision and order, and included as a sixth reason for the general finding.

Because of the foregoing reasons we are not able to approve the proposal before us. Although it would be possible to identify proposed individual rates that, considered in light of the present rates, would not be excessive, such specific rates cannot be viewed in isolation from the general proposal of which they are a part. Approval of only certain rates would create a new proposal in terms of rate relationships, the reasonableness of which cannot be determined. Moreover, all of the proposed rates are objectionable, as our findings indicate, under the various findings discussed, on grounds other than the rate level. In view of these findings it is not necessary or possible, to resolve numerous subsidiary issues, such a those pertaining to minimum weights and the provisions of the proposed penalty rule. These issues can be decided only in relation to rates otherwise found lawful.

Pursuant to the provisions of section 15(7) of the Interstate Commerce Act, respondents were required by order of Division 2, dated December 18, 1974, to keep account in detail of all amounts received by reason of the increased rates which became effective on December 31, 1974, specifying by whom and in whose behalf such amounts were paid, so that refunds could be ordered in the event that the increased rates were ultimately found not justified. Because we have concluded that the rates are not shown to be just and reasonable, the respondents are hereby ordered to refund with 4 percent interest, the charges collected by virtue of those rates to the extent such charges exceeded those otherwise applicable.

Commissioners Murphy and MacFarland did not participate.

It is further ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission.

ROBERT L. OSWALD
Secretary

(SEAL)

APPENDIX A

DECISION AND ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 30th day of December, 1974.

INVESTIGATION AND SUSPENSION DOCKET NO. 8944 [1]

FRESH FRUITS & VEGETABLES, TRANSCONTINENTAL & WESTERN POINTS

It appearing, That by order of May 28, 1974, the Commission instituted an investigation into and concerning tariff schedules setting forth new increased rates and charges and new rules, regulations and practices affecting such rates and charges, applicable on fresh fruits and vegetables, including onions and potatoes, applying generally on carload movements within the west and between the west and the east and south;

It further appearing, That a hearing commencing in Washington, D.C., on September 9, 1974, and subsequently continued in San Francisco, Calif., Washington, D. C., and Dallas, Tex., has been held, and that the extensive evidence adduced has been considered;

It further appearing, That respondents have supported the proposed rates by cost data designed to show that the existing rates are unduly depressed, and that the proposed rates are not excessive, and that primary reliance is placed on cost data based on current depreciation and capital costs of mechanical refrigerator equipment and locomotives;

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[1] This order also embraces Fourth Section Application No. 42830, Fruits and Vegetables From and to Colorado and Utah Points.

It further appearing, That protestants have adduced evidence tending to show that: (1) the proposed rates, which represent increases as high as 132 percent over present rates, will seriously disrupt the marketing of fresh fruits and vegetables, will largely eliminate the railroads as a feasible mode of transportation thereof, and will endanger the availability of these commodities, which are indispensable for a sound nutritional diet, for large segments of the Nation's population; (2) certain of the proposed rates are subject to rules providing for penalty payments for late deliveries, while other rates on traffic from similar origins to the same destinations are not subject to such provisions; (3) the rates are not subject to minimum weights appropriate for smaller rail cars and to the tariff circular rule generally known as Rule 66 providing that charges based on a car ordered apply when a larger car is furnished by the carrier; and (4) the proposed TOFC rates are not reasonably related to the proposed carload rates and are excessive;

We find, That due and timely execution of our functions under section 15(7) of the Interstate Commerce Act imperatively requires the omission of an initial decision.

We further find, That this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

We further find, That the respondents have not shown the proposed rates to be just and reasonable for the following reasons:

(1) The theory of replacement costs of equipment is invalid, particularly for mechanical refrigerator cars, since much of the movement of these commodities occurs in nonmechanical refrigerator cars. Furthermore, the entire theory of replacement costs is a corollary of reproduction value theory used in calculating a fair return on property devoted to transportation, a concept not heretofore accepted by the Commission, and should not be adopted with respect to only one category of freight. The cost data adduced which is not based on the described replacement cost theory does not support the proposed rates. The rates would exceed traditionally computed variable and fully distributed costs by wide margins in many instances, which is excessive for the traffic involved (see appendix);

(2) The proposed rates would largely eliminate the use of railroad transportation on many of the considered commodities with extreme hardship on the producers and consumers of such commodities;

(3) The proposed TOFC rates are not shown to be reasonably related to the proposed carload rates;

(4) Certain of the proposed rates are violations of the outstanding order of the Commission in *Washington Potato & Onion Shippers Assn., Inc.* v. *U.P.R. Co.,* 300 I.C.C. 537;

(5) The proposed penalty rule does not apply uniformly to all similar movements;

(6) Insufficient justification for Fourth Section departures in Fourth Section Application No. 42830 has been presented.

And we further find, That in view of the above findings, which will be more fully explained in a report to be issued shortly, the filing of briefs is not necessary for a proper disposition of this proceeding.

Wherefore:

It is ordered, That respondents be, and they are hereby, required to cancel the proposed schedules upon not less

than one day's notice within 30 days after the service date of this order.

By the Commission.

ROBERT L. OSWALD
Secretary

(SEAL)

APPENDIX A

Showing revenue/cost relationships developed by respondents when costs are computed without the contended for current capital and equipment costs.

Commodity #	Range of Variable Rate/Cost Ratios *
Vegetables and Melons other than carrots, etc. from Imperial Valley and related origins	1.276 - 1.478
Carrots, etc. from Imperial Valley and related origins	1.389 - 1.544
Light Loading Vegetables	1.298 - 1.541
Citrus Fruits	1.269 - 1.506
Deciduous Fruits	1.111 - 1.378
Carrots, onions, potatoes	1.354 - 1.585
Potatoes	1.324 - 1.514
Potatoes	1.085 - 1.446
Potatoes, Idaho	1.188 - 1.566

Categories of traffic used by respondents
* Average for all weight brackets

APPENDIX B

Potatoes—Red River Valley. Potatoes are grown extensively in the valley which lies along the Red River in western Minnesota and eastern North Dakota. According to United States Department of Agriculture (USDA) the 1973 potato production of this area was 29,190,000 hundredweight, consisting of 12,011,000 hundredweight of reds; 14,395,000 hundredweight of whites; and 2,784,000 hundredweight of russets. Although customer preference for the different varieties of potatoes depends on many factors including price and quality, Red River Valley potatoes are sold in general competition with potatoes grown in Idaho, Washington, Wisconsin, Colorado, Maine, and to a lesser extent, in New York and Michigan. Red River Valley potato movements are shown for 37 of the 41 cities for which the USDA compiled unload data in 1973. Cities which received more than 100 carloads are listed below in connection with a comparison of the present and proposed rates.

Though a few Red River Valley potato shippers are located on the lines of the Soo Line Railroad Company, most of them are served by the Burlington Northern, Inc. (BN). Thus, their primary source of equipment is the BN, or its subsidiary, the Western Fruit Express Company (WFE). Various types of cars are presently supplied for this traffic. Five years ago the entire movement was in RS or RSB cars. The RS cars are equipped with ice bunkers and are designed primarily for use of chunk ice, with or without ventilation. The RSB cars, converted from RS cars, are equipped with air circulating fans and interior slope sheets and conveyors and/or equipment for mechanical loading and unloading. About 1,000 cars were converted to the RSB type to meet the needs of the shippers for equipment suitable for bulk shipments. About 60 percent of the Red River Valley potato shipments are in bulk. Although icing service has been discontinued, icing cars

are still serviceable during the winter months, when heavy potato movements occur, with the use of portable heaters. However, the RS and RSB cars are being retired as obsolescent. In October 1974, there were 1,777 RS cars and 710 RSB cars still in service. The BN forecasts that all of these cars will be out of service by 1980.

WFE has also converted meat mechanical refrigerator cars for use as potato cars. These cars, now designated RPS cars, are capable of loading 82,000 pounds of packaged potatoes and 98,000 pounds of bulk potatoes. BN now has 360 RPS cars in service and has plans for converting an additional 93 RPB cars for a total of 453. Total expenditures on this conversion project will exceed $3 million.

BN also has available 61 conditionaire cars, designated as RLO cars. These are insulated hopper cars equipped with mechanical refrigerator units. They are suited only for bulk loading, but are capable of loading in excess of 165,000 pounds.

The planned 453 RPB cars and the 61 RLO cars will have a loading capacity of 891 RSB cars.

Although the RS and RSB cars are gradually being phased out of service, for the season ending June 20, 1974, 75.3 percent of the rail potato movements from the Red River Valley was in these cars, down from 82.6 percent for the season ending August 7, 1973.

There was a major downward rate adjustment on this traffic in 1958 and 1959 to meet truck or market area competition. Another such adjustment was made in 1962. As a part of these rate reductions, minimum weights were increased to 40,000 or 50,000 pounds. At the present time virtually all shipments move at rates subject to the higher minimum weight since there are no lower rates for heavier loads. The average railroad shipment of potatoes from the Red River Valley for the season ending June 1974 was

62,236 pounds. Included in this average were over 2½ million hundred weight moving in the heavier loading cars. The RLO cars carry a minimum loading weight of 165,000 pounds and the RPB and other mechanical refrigerator cars carry a minimum loading weight of 93,000 pounds.

The proposed rates begin at a minimum weight of 40,000 pounds, and decrease at 5,000 pound weight increments up to 90,000 pounds. The table on the following page shows the present and proposed rates (for certain minimum weights) from Grand Forks, N. Dak., a representative origin, to the larger markets of this traffic.

BN states that the large fleet of RS cars was taken into consideration when the 1958 and 1962 rate reductions were effectuated. With the obsolescence of the RS and RSB cars the carriers, it is asserted, no longer have a surplus of equipment. Thus, it is contended an improvement in revenue is necessary if "meaningful" transportation service is to be provided in the future. It is pointed out that the proposed rates would apply on cars officially listed as having an inside length not exceeding 54 feet, 8 inches, in contrast to the present rates which are restricted in their application, insofar as mechanical refrigerator cars are concerned, to cars not exceeding 44 feet, 7 inches inside length dimension. The change will make the rates applicable on an additional 2,200 jumbo mechanical refrigerator cars.

The proposed rates are opposed by the Red River Valley Potato Growers Association, which has a membership of about 1,500 growers, merchandisers and processors of potatoes grown in the Red River Valley, and the Grand Forks Chamber of Commerce, a non-profit North Dakota corporation organized for the purpose of fostering and promoting the business and civic interests of Grand Forks, N. Dak., as well as its trade area. Grand Forks is located in the center of the valley and its potato growing area.

To	Present Rates Unloads Rail	Truck	Proposed Rates 50,000 lbs	60,000 lbs	70,000 lbs	80,000 lbs	90,000 lbs
Atlanta, Ga.	322	366	209	326	277	253	234	213
Birmingham, Ala.	273	123	202	306	264	237	220	199
Chicago, Ill.	2,857	708	107	197	172	149	135	129
Cincinnati, Ohio	387	348	174	241	216	195	179	174
Cleveland, Ohio	135	163	180	248	227	206	188	180
Dallas, Tex.	276	456	179	290	253	222	210	190
Kansas City, Mo.	476	450	113	200	175	154	139	132
Louisville, Ky.	167	245	161	229	206	183	169	164
Memphis, Tenn.	468	311	168	271	238	210	198	182
Milwaukee, Wis.	191	41	98	179	157	138	124	118
Minneapolis, Minn.	688	1772	45	107	91	84	78	72
New Orleans, La.	242	290	204	345	294	264	243	220
Oklahoma City, Okla.	168	246	160	252	218	198	176	167
Pittsburgh, Pa.	156	15	195	266	242	217	200	195
St. Louis, Mo.	1,346	188	113	215	194	169	153	147
San Antonio, Tex.	191	39	200	341	289	262	242	219

These protestants supported by the North Dakota Public Service Commission, propose that a uniform graduated scale rates should be devised for potatoes that would be applied from all shipping points so that each area could enjoy the advantages of its proximity to markets while paying for the mileage involved for its transportation. They also contend that until the RS and RSB refrigerator cars are phased out for their traffic the present 50,000-pound rates on potatoes, as increased by ex parte increases, should be continued. This, they argue would enable shippers to continue to use the RS cars on 50,000 to 60,000-pound loads, the maximum for that equipment. The proposed uniform scale of rates would apply for higher minimum weights for shippers able to obtain the larger mechanical refrigerator cars for loading and able to sell heavier loads.

One of the principal objections of these protestants to the proposed rates is that the largest increases would be on movements to their largest markets, such as Chicago, Kansas City, and St. Louis. They are also concerned with the effect that the proposed rate scale will have on competitive relationships among producing areas. It is noted for example, that greater increases are proposed from the Red River Valley than from Idaho in some instances. The differences in the proposed increases are shown for the named important destinations from representative origins, Grand Forks and Idaho Falls, Idaho in the table below:

To:	From:	Grand Forks	Idaho Falls	
		50,000 pounds % increase	60,000 pounds % increase	80,000 lbs. % increase
Chicago, Ill.		84.1	15.4	5.6
Kansas City, Mo.		77.0	35.7	24.2
St. Louis, Mo.		90.3	29.7	18.8

It is also shown that the existing rate spread between Grand Forks and Idaho Falls to most destinations would be adversely affected. For example, to Chicago, on ship-

ments of 60,000 pounds (using the 50,000-pound rate from Grand Forks) the present rate spread, Idaho Falls over Grand Forks, is 83 cents. This would become 56 cents under the proposed rates. On 80,000-pound shipments the corresponding spread would be reduced from 58 to 44 cents. However, rates somewhat lower, subject to a minimum of 90,000 pounds are proposed for Grand Forks and not from Idaho.

The Red River Valley protestants also show the relationship that the present and proposed rates bear to first class rates from Grand Forks and Idaho Falls for shipments of 60,000 and 80,000 pounds. The percentage relationship of the present and proposed rates from Idaho Falls are lower than the corresponding relationship of the Grand Forks rates.

Comparisons are made of the car-mile earnings of the present and proposed rates from Grand Forks and Idaho Falls on shipments of 60,000 and 80,000 pounds. The car-mile earnings of the present, as well as the proposed, rates from Grand Forks are higher. Comparisons of the present and proposed rates for shipments of 60,000 and 80,000 pounds to destinations of comparable distances are shown, indicating that the Red River Valley rates are higher than Idaho rates on shipments of similar distances. For example, although Idaho Falls is 263 miles more distant from Dallas than Grand Forks, the proposed Idaho Falls rate is 23 cents lower than the proposed Grand Forks rate on 60,000 pounds, and 28 cents lower on 80,000 pounds. In addition to the Idaho potato origins, these protestants are concerned with potato shipments from Maine to markets in the eastern and southern markets because the rates from Maine are not being increased.

Dry Onions and Potatoes—Idaho and Eastern Oregon. Southwest Idaho and adjoining Malheur County, Oreg., is a major onion producing region of the U. S. The region grew 11,200 acres of onions in 1974, an increase over

8,300 acres grown in 1969. Yield per acre has also increased from 450 hundredweight in 1969 to 508 hundredweight in 1973. The region's 1973 production amounted to the equivalent of 12,000 carlots (40,000 pounds). These onions are marketed throughout the U. S., with 20 percent of the production going to New York terminals alone. Philadelphia, Boston and other large eastern cities are also important markets for this product. Fifteen years ago virtually all of the onions were shipped by railroad. In 1974 approximately 42 percent of the shipments were by truck, though because of increased production the number of carloads handled by the railroads has remained at about 6,500 per year. Since a large portion of the onion crop is stored the shipping season extends from August through mid-April.

The USDA in a November 1974 publication forecast a total fall potato production for the U.S. of 287,866,000 hundredweight, of which 80,045,000 hundredweight, or about 27.8 percent was attributed to Idaho production. Idaho harvested 300,000 acres of potatoes in 1972 and 323,000 acres in 1973.

There are three recognized potato producing areas in Idaho. The first, centered around Bingham, Bonneville and Jefferson Counties in eastern Idaho accounts for 61 percent of the state's potato production. The second described as Twin Falls/Burley (Magic Valley) in central Idaho accounts for 27 percent of the Idaho potato production. The third area, centered around Elmore County in western Idaho grows about 12 percent of the state's potatoes.

More than 99 percent of the total Idaho potato production consists of the Russet Burbank variety. In 1972, 58.9 percent of the production was processed for food, 3 percent for starch and flour, with 23 percent of the crop going into the fresh market. About 84.6 percent of the shipments are by railroad and 15.4 percent by truck, relatively few

inbound trucks being available for exempt outbound movements of potatoes from Idaho.

The present rates on Idaho onions differ from the potato rates. Generally, the present onion rates are subject to a minimum of 40,000 pounds. However, from Idaho Falls and Payette there are onion rates subject to a minimum of 80,000 pounds to a few destinations. The proposed rates are generally the same for onions and potatoes. The following table shows the present and proposed onion rates at the Ex Parte No. 281 level, from Payette to representative destinations.

DESTINATIONS	MINIMUM WEIGHTS (pounds)	PRESENT RATES	PROPOSED RATES
Chicago, Ill.	40,000	185	
	60,000		199
	80,000	150	158
New York, N.Y.	40,000	249	
	60,000		319
	80,000		243
Dallas, Tex.	40,000	180	
	60,000		188
	80,000	127	149
Atlanta, Ga.	40,000	221	
	50,000		297
	55,000		271
	60,000		249
	80,000	178	197

Since 1970 reduced rates on potatoes from Idaho were established subject to a minimum of 80,000 pounds. The reductions were made to meet truck competition and to encourage heavier loading. The then existing 50,000-pound rates were restricted to ice bunker cars and retained. Those rates, subject to a 60,000-pound minimum were made applicable for potato shipments in mechanical refrigerator cars. The proposed potato (and onion) rates are not related to type of equipment.

The proposed rates were designed to establish constant relationships among origins. Idaho Falls, a representative origin located in the largest shipping area was used as a base point and rates from other origins were developed in relation to the Idaho Falls rates. Thus, the proposed rates from Nampa are 8 cents over the proposed Idaho Falls rates, and the proposed rates, discussed below, from Moses Lake, Wash. and western Washington are 8 and 13 cents, respectively, over the proposed Nampa rates. In developing rate relationships among destinations, the proposed rates were first established for base or key destination points and rates to other destinations were related to the key points. The following table shows the present and proposed rates at the Ex Parte No. 281 level, from Idaho Falls to a representative destination in each major rate territory.

DESTINATIONS	MINIMUM WEIGHTS (pounds)	PRESENT RATES	PROPOSED RATES
Chicago, Ill.	60,000	166	191
	80,000	142	150
New York, N.Y.	60,000	221	311
	80,000	201	235
Dallas, Tex.	60,000	140	180
	80,000	119	141
Atlanta, Ga.	60,000	187	241
	80,000	169	189

The Union Pacific Railroad (UP) is the only railroad originating onions and potatoes in Idaho. More than 90 percent of the cars used in this Idaho traffic are owned by the Pacific Fruit Express Company (PFE), a car line company jointly owned by UP and the SP. During 1973, PFE

owned 13,070 mechanical refrigerator cars for the full year. On December 31, 1973, it had 2,776 RS (ice bunker) cars in service. UP represents the proposed rates as compensatory, and reasonably related as to origins and destinations. Additionally, it points out that if allowed, the proposed rates would result in tariff simplication, reducing the present hundreds of pages of tariff matter in several tariffs to 61 pages in one tariff.

The proposed onion rates are opposed by the Idaho-Oregon Fruit and Vegetable Association, Inc., whose membership accounts for about 90 percent of the fruit and vegetable production of southeast Idaho and Malheur County, Oreg. The protestant desires the continued use of the RS cars for the life of the RS car fleet, and hopes to adapt in the interim to the larger mechanical cars if markets permit. It regards the RS car with its ventilator service as the most desirable car for onion shippers, asserting that the larger mechanical refrigerator cars are not well suited for onions because their minimum weights are too large for most customers and are too costly. The western type of onion is large and soft, and hence prone to bruising which produces decay. Thus protestant states that high loading in a car subjects the bottom tier to excessive weight and damage. Onions are now shipped in bags, mostly 50-pound bags. Experiments with cartons, which would allow heavier loading, have been unsuccessful because cartons do not allow enough ventilation. Therefore, this protestant claims that an increase in the minimum weights will result in a potential loss of markets to the western onion shipper unless a diversion to trucking is possible. Idaho onion shippers are stated to prefer rail over truck service.

The proposed potato rates are opposed by the Idaho Grower Shippers Association, a voluntary, nonprofit trade association. Its members, consisting of growers, shippers and processors of Idaho potatoes account for more than 90 percent of the potato shipments from Idaho.

Also appearing in opposition to the proposed rates is the Idaho Potato Commission, a state commodity commission created to further the production and consumption of potatoes grown in Idaho. Financing of its activities is provided by grower, shipper and processor elements of the Idaho potato industry under a tax currently levied in the amount of 3 cents per hundred-weight on potatoes entering commercial channels. For the fiscal year of 1975-76, it has budgeted $1,196,345 for advertising and $317,970 for research and education. It points out that Idaho is a far distance from its market area, making freight costs important to its program.

Dry Onions and Potatoes—Washington. In the 1972-73 season USDA statistics show that there were 70,763 carlot originations of potatoes by railroad in the United States. Of these, 6,775 originated in Washington. During the same season the equivalent of 138,245 carlots (50,000 or 55,000 pounds) originated by truck, of which 5,196 originated in Washington. According to USDA statistics for the period extending from July 1972 through June 1973, Washington potatoes were shipped by railroad to all major United States markets, the largest market being New York, N.Y., which received 522 carloads from Washington. The total railroad movement from Washington to these major markets was 3,427. The larger markets and the Washington carlots received by rail were: Atlanta, Ga., 145; Baltimore, Md., 129; Boston, Mass., 171; Chicago, Ill., 294; Houston, Tex., 179; Kansas City, Mo., 101; Los Angeles, Calif., 300; Philadelphia, Pa., 289. The same source shows that the equivalent of 4,737 carlots moved by truck to major United States destinations in this period.

In 1973 Washington originated 268 carloads of onions, and an unknown amount, but an amount assumed by protestants to be larger, by truck. USDA figures indicate that a preponderance of these movements were to eastern cities and Chicago.

Approximately 80 percent of the Washington potato crop is processed, the balance being shipped fresh. The heaviest shipping season for Washington potatoes is during July, August, September and October. Other potato producing areas market potatoes in this season in competition with Washington. Recently there has been a substantial diversion of Washington potato movements from rail to truck. According to figures compiled by the state of Washington, in 1973, the railroads had handled 245,080,000 pounds of potatoes by October 25, while only 114,540,000 pounds moved by rail in the corresponding period of 1974. Potato shipments by truck dropped one percent in 1974 from 1973.

Washington shippers are served by the Chicago, Milwaukee, St. Paul and Pacific Railroad (Milwaukee), the UP and BN. There is limited evidence in the record concerning equipment of the Milwaukee, though one witness indicated equipment shortages on that line had occurred even during periods of plentiful supply on the BN. Equipment of the UP and BN suitable for this traffic has been previously discussed.

At the present time the rates on Washington onions are subject to a minimum of 40,000 pounds. Herein it is proposed to eliminate the 40,000-pound minimum, and to establish rates, applicable on potatoes, as well as onions, subject to minima of 60,000 and 80,000 pounds. The first table below sets forth the present and proposed onion rates, at the Ex Parte No. 305 level from Warden, Wash., to representative major destinations.

The present rates on potatoes are subject to minima of 50,000, 60,000, 70,000 and 80,000 pounds. The 50,000-pound rates apply only on RS (ice bunker) cars, the 60,000-pound rates apply on all mechanical refrigerator cars, the 70,000-pound rates apply only on smaller mechanical refrigerator cars and the 80,000-pound rates apply only on large mechanical refrigerator cars. The proposed rates are published only for minima of 60,000 and 80,000 pounds without

reference to car used. The proposed rates are consistently related to rates from western Idaho.

The second table below shows the present and proposed rates at the Ex Parte No. 281 level, from Moses Lake, Wash., a representative point in eastern Washington and points in western Washington to representative major destinations. Also shown are rate relationships between the Washington rates and rates from Nampa, Idaho and the percentage of rate increases proposed.

DESTINATIONS	MINIMUM WEIGHTS (pounds)	PRESENT RATES	PROPOSED RATES
Chicago,	40,000	243	
Ill.	60,000		260
	80,000		208
New York,	40,000	319	
N. Y.	60,000		405
	80,000		312
Dallas,	40,000	224	
Tex.	60,000		245
	80,000		198
Atlanta,	40,000	289	
Ga.	50,000		378
	55,000		347
	60,000		319
	80,000		256

Destinations	Minimum Weights (Pounds)	Moses Lake, Wash. Present Rates	Spread over Nampa Id.	Proposed Rates	Proposed Nampa, Id. Spread	% increase	Western Washington Present Rates	Spread over Nampa, Id.	Proposed Rates	Proposed Spread over Nampa, Id.	% increase
Chicago,	60,000	185 *	9	207	8	12	190 *	14	212	13	12
Ill.	80,000	158#	8	166	8	5	163#	13	171	13	5
New York,	60,000	242 *	8	327	8	35	246 *	12	332	13	35
N. Y.	80,000	—	—	251	8	—	—	—	256	13	—
Dallas	60,000	159 *	9	196	8	23	164 *	14	201	13	23
Tex.	80,000	135#	8	157	8	16	140#	13	162	13	16
Atlanta	60,000	209 *	12	257	8	23	215 *	18	262	13	22
Ga.	80,000	189#	11	205	8	8	194#	16	210	13	8

In RP cars not exceeding 44 feet, 7 inches, minimum weight 70,000 pounds, except RPB cars, minimum weight 75,000 pounds. In RP cars exceeding 44 feet, 7 inches, minimum weight 80,000 pounds.

* Minimum weight 50,000 pounds in RS cars.

The proposed rates are opposed by the Washington Potato and Onion Association. This protestant objects to the rate increases proposed and to the alteration in minimum weights, specifically the elimination of the 40,000-pound minimum on onions, the 50,000-pound minimum on RS cars, and the 70,000-pound minimum on small mechanical refrigerator cars. It contends that because of the damageability of onions when shipped long distances in rail cars that a minimum weight of 40,000 pounds is necessary and states that the largest mechanical cars cannot load more than about 50,000 to 55,000 pounds.

The protestant indicates that because of the present rates Washington shippers have lost sales to shippers closer to the markets. It believes that the proposed rates would constitute an economic embargo for their potatoes in some areas, particularly the midwest. Washington shippers have started trucking some potatoes all the way to the east coast.

With respect to the 50,000-pound minimum now applicable to RS cars, the protestant states that such cars are available and used extensively during vent seasons when ice service is not required and during heater periods, as well as when car shortages occur. It asserts that the lowest minimum proposed, 60,000 pounds, cannot be loaded in such cars. Concerning the proposed elimination of the 70,000-pound minimum rates presently applicable on small refrigerator cars, it asserts that the proposed 80,000 pound minimum is excessive since potatoes shipped in bags cannot be loaded to the proposed minimum of 80,000 pounds. While it is possible to load more than 80,000 pounds of potatoes in bulk in these cars, relatively few receivers of Washington potatoes are equipped to receive bulk shipments.

This protestant objects to the application of the proposed penalty rule for late deliveries on potato shipments from origins served by the UP, such as California points and

the Klamath Falls, Oreg. area, and not from Washington origins, served by the UP.

It also relies on a rate order prescribed by this Commission in *Washington Potato & Onion Shippers Assn., Inc.* v. *U.P.R. Co.*, 300 I.C.C. 537, where it was found that rates on potatoes from eastern Washington should be no more than 7 cents higher than potato rates from southern Idaho and eastern Oregon, and rates from western Washington should be no more than 11 cents higher than such rates.

The proposed rates are generally defended as compensatory by the UP and necessary for continued service. It defends the proposed alteration in minimum weights as an incentive to heavier loading. It has had several loads of onions in mechanical refrigerator cars, apparently the larger type, with weights in excess of 70,000 pounds, some in excess of 80,000 pounds and one of 95,000 pounds.

UP leaves open the possibility of later making the penalty rule applicable to Washington shipments. It recognizes that the proposed rate spreads between Washington and Idaho shipments are not those prescribed in the cited proceeding, but notes that so are the present rates. It takes the position that the involved order may be vacated or modified in this proceeding to allow the proposed rates.

Deciduous Fruits—Washington and Oregon. The total 1974 production of apples in the U.S., according to U.S.D.A. estimates, was 146,317,000 bushels. Of this total, Washington produced 27.16 percent. During 1973 there were 10,322 rail shipments of deciduous fruits (including 7,951 shipments of apples) from Washington and 7,951 shipments (including 1,368 shipments of pears) from Oregon. Cherry shipments from this area in 1974 amounted to 474½ carloads by rail and 1,057 carlots by truck.

The variety of apples grown in Washington and Oregon is red delicious which is produced for the fresh market and are not suited for processing. To market their crop these

states must sell 40 to 50 percent of their total production in markets east of the Mississippi. The following table shows rail and truck movements of apples from Washington to major eastern points in 1973.

DESTINATION	RAIL	TRUCK*
Atlanta, Ga.	91	275
Chicago, Ill.	274	969
Miami, Fla.	133	156
New York, N.Y.	1,504	297
Philadelphia, Pa.	439	57

*900 cartons per load

Although there has been a fairly constant or increasing production of apples in this area, the amount being diverted to truck has constantly increased. In 1950, 19.1 percent of the shipments moved by truck. This increased to 43 percent in 1960, 69.9 percent in 1970 and 82.1 percent in 1973. Trucks now make substantial shipments to New England, New York and Florida, as the above table indicates. In 1973, about 43 percent of the cherry movement was by truck. Owing partly to a late season this increased to 56 percent in 1974.

The area's fruit growers are served by the BN and UP.

Presently there are rates at 40,000 pounds and lower on apples (and cherries). The 40,000 pound rates would be continued only for cherries. The lowest minimum weight proposed for apples is 50,000 pounds. Illustrative of the proposals are increases in the rates to New York, N.Y. These increases would amount to 50.67 and 34.7 percent at 50,000 and 60,000 minima, respectively. Lower rates are proposed at minima of 70,000 and 80,000 pounds.

The Northwest Horticultural Council, composed of associations of growers, packers, marketers and shippers of deciduous fruits and state commodity commissions, who account for nearly all apple production in Washington

and Oregon, and over 90 percent of the other deciduous fruits grown in those states, oppose the increased rates here proposed. It contends the rates, if allowed, will result in massive diversion of this traffic to trucks. Presently the truck rates are higher than the existing rail rates. Even with that competitive situation, it points out there has been substantial diversion to trucks. Some of the proposed rates would be higher than prevailing truck rates.

This protestant also objects to proposed changes in the rate relationships of origins, giving Medford, Oreg. higher rates, not related to distances for many destinations. Opposition is also taken to the proposed elimination of 40,000-pound, and under, rates, except on cherries. This, it is contended would eliminate the use of RS cars, which are still needed and used in emergencies. However, this protestant supports efforts to encourage heavier loading through incentive rates. It further contends that the railroads have a favorable revenue/cost return on apples considering heavier loading being experienced in 1974, and Ex Parte Nos. 303 and 305 increases.

The proposed penalty rule would apply on pears shipped from Medford, Oregon, but not from other northwest districts. This, it is argued, would constitute discrimination in favor of the Medford shippers whose winter pears are harvested at substantially the same time as the other northwest pears and are packed, graded and stored in a comparable manner.

Fresh Deciduous Fruits and Grapes California and Arizona. A substantial portion of the nation's grapes and deciduous fruits shipped for fresh consumption is grown in California and Arizona. The percentages of California production of total United States production in 1972, according to USDA statistics, for the following named fruits and grapes were: Apricots, 87.6 percent; cherries (sweet), 33.5 percent; nectarines, 100.0 percent; peaches, 18.2 per-

cent; pears, 40 percent (est.); plums, 100.0 percent; and grapes 92.4 percent. The 1973 volume of fresh deciduous fruits shipped from California and Arizona was the equivalent of approximately 37,700 carlots.

Much of the California fresh grape and deciduous fruit traffic is shipped to eastern markets. In 1973 rail shipments to New England states, New York, Pennsylvania, New Jersey, Maryland, Washington, D.C., Virginia, West Virginia and eastern Ohio accounted for about 46 percent of total rail shipments. Nine major cities, Baltimore, Md., Boston, Mass., Chicago, Ill., Cincinnati and Cleveland, Ohio, Detroit, Mich., New York, N. Y., Philadelphia, Pa., and Pittsburgh, Pa., received more than half of the fresh grapes and deciduous fruits shipped from California and Arizona. California grapes and deciduous fruits are marketed in competition with eastern and southern grown fruits and melons.

The per capita consumption of fresh grapes and deciduous fruits has consistently declined over the past two decades. In 1950, the per capita consumption of these fresh products was, according to a USDA report, 20.1 pounds. This source shows a per capita consumption of fresh grapes of 5.4 pounds in 1950 and 1.8 pounds in 1972.

Railroad participation in this traffic has consistently declined over recent years. In 1960, of 47,899 shipments of apricots, cherries, nectarines, peaches, pears, plums and grapes, 72.3 percent moved by rail. In 1970, the railroads handled 59.1 percent of 34,376 total shipments. Railroad participation in 1973 was 43.8 percent of 36,711 total shipments. Conversely, shipments by trucks increased 50 percent in the 1960-1973 period. Diversion from rail to truck increased sharply in 1974. Although truck shipments have increased as rail shipments have declined, total shipments declined from 18,239 in 1965 to 11,672 in 1973.

The present rates on this traffic are subject to minimum weights ranging from 26,000 to 40,000 pounds except on pears and papayas, for which there are presently rates subject to a 50,000-pound minimum. Presently, there is a "rate blanket" under which the same rate applicable at Chicago is applicable to points east thereof. The proposed rates have been increased through ex parte increases by 64.7 percent since 1965.

The proposed rates, except on fresh cherries, are subject to minima of 50,000, 60,000, 70,000 and 80,000 pounds. Lower minima of 40 and 45,000 pounds for fresh cherries are proposed. The following comparison, developed from a protestant exhibit, compares the present 40,000 pound rates, under which most of the traffic moves, with the proposed 50,000-pound rates, both at the Ex Parte No. 305 level.

	PRESENT RATE	MINIMUM WEIGHT	REVENUE PER CAR	PROPOSED RATES	MINIMUM WEIGHT	REVENUE PER CAR	INCREASED REVENUE PER CAR	PERCENT INCREASE
BOSTON, MASS.	318¢	50,000	$1590.00	564¢	50,000	$2820.00	$1230.00	77.4%
NEW YORK, N.Y.	318¢	50,000	1590.00	551¢	50,000	2755.00	1165.00	73.3%
PITTSBURGH, PA. CLEVELAND, OHIO CHARLESTON, W. VA.	318¢	50,000	1590.00	482¢	50,000	2410.00	820.00	51.0%
CINCINNATI, OHIO DETROIT, MICH. INDIANAPOLIS, IND.	318¢	50,000	1590.00	442¢	50,000	2210.00	620.00	39.0%
CHICAGO, ILL. MILWAUKEE, WIS.	318¢	50,000	1590.00	382¢	50,000	1910.00	320.00	20.1%
ATLANTA, GA.	318¢	50,000	1590.00	421¢	50,000	2105.00	515.00	32.4%
COLUMBIA, S. C. JACKSONVILLE, FLA.	318¢	50,000	1590.00	462¢	50,000	2310.00	720.00	45.3%
MIAMI, FLA.	333¢	50,000	1590.00	501¢	50,000	2505.00	915.00	57.5%

The California Grape and Tree Fruit League, whose members produce, harvest or market about 70 percent of the grapes and deciduous fruits shipped from California and Arizona, protest the proposed rates. It objects to the level of rates proposed, to the elimination of the blanket rates, to the elimination of transit privileges to complete loading in the origin territory, to changed diversion privileges and the proposed manner of publishing the penalty rule, previously referred to, and discussed above, and to the elimination of TOFC service in some areas. It states that the proposed service changes and increased rates will without question eliminate all eastbound shipments of these commodities by rail. It maintains that lading weights in excess of 40,000 pounds for deciduous produce is unrealistic because of its highly perishable nature.

It projects that the railroads will have lost 4,000 carloads of fresh deciduous fruit traffic by the end of 1974, or 30 percent of the 1973 traffic moving by rail. It attributes the diversion of traffic from the railroads to trucking to the inferior service and increased rates of the railroads. It argues that the diversion of eastbound fresh fruit traffic causes a further erosion of rail traffic moving westbound since the truckers tend to move their trucks loaded in both directions. It states that in no other branch of agriculture and from no other source of production of fresh deciduous fruit does transportation bear so heavily on the grower, mainly because of the extremely perishable nature of the commodities and the long distance between growing area and market.

The respondent railroads contend that the time has come for each car of traffic to pay its own way, whatever quantity the shippers desire to ship. They defend the elimination of the eastern rate blanket as necessitated by costs of service, noting that competing exempt motor carriers charge more for the longer distances. In rebuttal the railroads show examples of shipments of grapes and deciduous

tree fruits moving at weights in excess of 50,000 pounds, and an increase in loading weights in recent years. It defends the described discontinuance of TOFC service as warranted by dwindling traffic and exceptional operating costs associated with the handling of the remaining traffic.

Vegetables and melons California and Arizona. Among the vegetables affected by the proposed rates are asparagus, broccoli, brussel sprouts, cauliflower, green onions, cabbage, carrots, celery and lettuce. USDA statistics for 1972, based on rail carlot equivalents, show 1,909 shipments of asparagus originated in the United States, all in California, and Arizona. For the same years, the total U.S. production and the California-Arizona portion of the portion of the following commodities were: broccoli, U.S., 6009 shipments, California-Arizona portion 5,869 shipments (97.7 percent); carrots, U.S. 18,275 shipments, California-Arizona portion, 13,483 shipments (73.8 percent); cauliflower, U.S., 5,801, California-Arizona portion, 4,817 shipments (83 percent); lettuce, U.S. 106,334 shipments, California-Arizona (and other western states) 97,631 (91.8 percent).

Most of this traffic originates on the SP, UP, or Santa Fe. Over the past 10 years perishable traffic has accounted for 6.8 percent of UP's total revenue. In 1973 its revenue from perishable traffic was $60.1 million, 5 percent of its total revenue. Hundreds of miles of UP track exist for the primary purpose of serving shippers of fresh perishable commodities. SP, UP and PFE provide virtually all of the mechanical refrigerator cars for this traffic originating on their lines. Much of the traffic terminates on the Penn Central Transportation Company (Penn Central). In 1973, 34.7 percent of the total of fresh fruits and vegetables terminating on Class I railroads, terminated on the Penn Central.

The present rates are a combination of hundred-weight and per-car rates. The history, design and structure of

the per-car rates are discussed *Vegetables and Melons, Transcontinental Eastbound,* 335 I.C.C. 798. The proposed rates are stated in cents per 100 pounds. Rates on light-density fresh or green vegetables, for example, broccoli and green onions, are subject to minimum weights of 30,000 and 35,000 pounds. Rates are proposed on other vegetables and melons, except potatoes, on minimum weights from 40,000 to 90,000 pounds, at 5,000-pound increments. Rates on carrots, onions and potatoes are proposed at 65,000, 75,000 and 85,000 pounds. Over the past decade this traffic has been diverting to trucks more on short than long hauls, as the following table indicates.

CALIFORNIA
RAIL LETTUCE SHIPMENTS

DESTINATIONS	1	2	% 2 of 1
Salt Lake City, Utah	35	8	22.86
Denver, Colo.	16	4	25.00
Kansas City, Mo	69	13	18.84
Chicago, Ill.	2516	2221	88.28
New York, N.Y.	4653	3824	82.16
Boston, Mass.	1887	1955	103.60

The railroads have concluded that the equipment with which they must meet their competition (exempt trucking) is the mechanical refrigeration car having an inside length of 50 feet. The proposed rates were designed to meet the costs of such cars. They recognize that the costs associated with this car will not insure its use in all lengths of haul or for all weights. On Florida movements, which have been largely diverted to trucks, they do not intend to publish rates for this equipment. But these rates are proposed here on the theory that for large loads and long hauls the railroads should be able to exercise an inherent cost advantage.

According to the respondents, they were faced with the alternatives of leaving the rates at their present levels

to minimize diversion of traffic and thereby recover insufficient revenue to replace refrigerator cars as they wore out, or to increase the rates to a level commensurate with costs, risking diversion to motor carriers on shorter hauls, and generate sufficient revenues to insure replacement of retired equipment or add to the car fleet for the business that remains. They have chosen the latter alternative.

Western Growers Association (WGS), a trade association of growers of fresh vegetables, melons and potatoes, whose members produce or ship about 85 to 90 percent of these products from California and Arizona origins, opposes the rates, though its opposition to the rates proposed on the heavy density commodities, which includes lettuce, results only from the failure of respondents to provide assurances that adequate equipment will be made available to all shippers when needed, and to provide a substitution car rule. It refers to car shortages that have occurred, most recently in June 1974, and contends that the proposed rates, as published, will render all small cars obsolete, thereby making less cars available for loading. In its view the proposed rates, which provide progressively lower rates for heavier loading, will result in the shippers using only the larger cars. It seeks a substitution car rule under which a shipper would pay the rate for the weight loadable in a larger car when such a car is ordered and a smaller car is furnished. It contends that this is necessary because the shipment is often sold when the car is ordered and the buyer expects to pay the rate applicable to the weight of the shipment purchased. When the carrier substitutes a smaller car for the larger car ordered, the full shipment cannot be loaded, and the rate charged is higher. WGA take the position that when a shipper orders a large car he should be able to pay the same per unit cost whether or not the large car is furnished.

WGA opposes the rates on light density vegetables as excessive per se, and as not reasonably related to heavy

density traffic. It states that the hardship placed upon shippers of low density commodities by the proposed rates will have a potentially catastrophic impact upon the growing, transportation, marketing and distribution of these vegetables. It also objects to the proposed minimum weight for small cars on light density vegetables because of their loadability and the alleged inability of the markets to absorp heavy shipments of such commodities.

Citrus Fruits—California and Arizona. The considered citrus fruits originate from three distinct growing areas, the San Joaquin Valley of California, with 24 origin points, the southern California district with 32 origin points, and the desert area, principally in Arizona, with five origin points. All origins are subject to the same transcontinental rates. California-Arizona citrus fruit production has increased in recent years, growing from 136,000 carloads in 1970 to an estimated 139,900 carloads in 1974. The latter crop was reduced by frost. It is estimated that the 1975 crop will be 151,700 carloads. Projections through 1979 indicate further increases in production.

The majority of rail shipments moves to destinations in Transcontinental Territory, to Chicago and points east thereof. Transcontinental destinations are grouped into rate groups, rendering the same rate applicable to all points within the group. For the 1972-73 season, Sunkist Growers, Inc. (Sunkist) a major shipper, shipped 20,663 shipments of fresh citrus fruits. Of these 10,778 carloads, 52 percent of the total, moved to Rate Groups A and A-1, which include points in Virginia, New York, Pennsylvania, and New England. Only 1,284 carloads, 6 percent of the total, moved to Chicago and points grouped therewith.

Fresh citrus fruit is relatively hardy, and can maintain its quality for a substantial period of time between harvest and consumption. It does not bruise easily or become

damaged when loaded in large quantities. Hence, it can withstand long transit and can be loaded up to 80,000 or 90,000 pounds.

The present rate on oranges, grapefruit and tangerines from California-Arizona origins, at the Ex Parte No. 305 level, to Chicago and New York is 334 cents, minimum 39,200 pounds. The proposed rates, also stated at the Ex Parte No. 305 level, and related minima to Chicago are: 375 cents, 50,000 pounds; 320 cents, 60,000 pounds; 284 cents, 70,000 pounds; 255 cents, 80,000 pounds; 233 cents, 90,000 pounds. To New York, the proposed rates and minima are: 536 cents, 50,000 pounds; 460 cents, 60,000 pounds; 420 cents, 70,000 pounds; 382 cents, 80,000 pounds; 347 cents, 90,000 pounds.

During the past five years, there has been a steady diversion from rail to truck of citrus fruits moving from California, even on long haul movements. The percentage of rail and truck participation in the traffic for recent seasons shown below:

SEASON	CARTONS SHIPPED	PERCENT RAIL	PERCENT TRUCK
1968-69	41,840,500	67	33
1969-70	40,759,000	68	32
1970-71	40,018,000	62	38
1971-72	41,979,000	59	41
1972-73	39,060,000	53	47

The lawfulness of the present transcontinental rail rates on citrus fruits is now pending before the Commission in Docket No. 35960, Sunkist Growers, Inc., et al. v. Akron, Canton & Youngstown Railroad Company. The rates sought by the complainants there are lower than those proposed here, although the complainants are willing to have rates subject to a 50,000-pound minimum es-

tablished that are higher than the present rates, provided lower incentive rates are established for heavier shipments.

The proposed rates are opposed by Sunkist, one of the complainants in the cited proceeding. Sunkist is a cooperative marketing association, selling fruit for the account of its members. It sells about 70 to 75 percent of the California-Arizona citrus fruit crop produced each year. It states that the proposed rates will result in the end of rail transportation as an important and significant mode of transporting fresh citrus fruit to market. According to its data, the proposed rates, when refrigeration charges are included, will be greater than current costs for trucking at almost all weight levels. It expresses a willingness to accept rates 12 percent above variable costs computed in accordance with the Commission's cost formula.

Sunkist objects to the proposed charges for reconsignment and diversion, and the absence of such privileges in southern territory. It also claims that the proposed rule governing stopping to unload is too restrictive.

It ascribes the past diversion of this traffic from the railroads to the lack of incentive rates, to ex parte increases and to erratic service.

The respondents defend the proposed rates as generally necessary to return the cost of moving the traffic as well as a return on the capital investment in the refrigerator cars used for such movements. They state that the proposed rates are established at the minima requested by the shippers.

Fresh Fruits and Vegetables—Texas. Texas ranks third behind California and Florida among all the states in the production of citrus fruit, cantaloupes, watermelons and approximately 30 different varieties of vegetables. The principal shipping areas are the lower Rio Grande Valley, the Laredo, Winter Garden, and San Antonio areas,

the Pecos West Texas area and the Hereford area. This production is marketed in nearby areas, as well as major U.S. cities, such as Chicago, Pittsburgh, Buffalo and Detroit.

There has been an increasing diversion of this traffic from the railroads to trucking. From the Rio Grande Valley the railroad share of the fresh fruit and vegetable traffic declined from 45 percent of total shipments in the 1963-64 season to 19 percent in the 1973-74 season. Shipments to the major markets from Texas by rail declined to 16 percent of the total in 1973.

At the present time rail rates for this traffic vary with commodity. The present minimum weights range from 20,000 to 90,000 pounds. The proposed rates, which apply to all fresh fruits and vegetables, are published at minima of 40,000 pounds, and at increments of 5,000 pounds, up to 90,000 pounds. The following table shows the present and proposed rates on cabbage, "all vegetables," and dry onions from McAllen, Tex. to the named representative destinations for the indicated minimum weights.

DESTINATIONS	Present		Proposed		Percentage Increase	
	40,000 Pounds	50,000 Pounds	40,000 Pounds	50,000 Pounds	40,000 Pounds	50,000 Pounds
Detroit, Mich.	226	201	435	354	92	76
Pittsburgh, Pa.	234	208	452	372	93	79
Buffalo, N.Y.	242	216	473	385	95	78
New York, N.Y.	277	257	521	429	88	67
Boston, Mass.	277	257	564	466	103	81
Chicago, Ill.	187#	183*	392	320	109	75

The rate on "all vegetables" is 210 cents.
* The rate on dry onions is 169 cents.

The proposed rates are opposed by the Texas Citrus and Vegetable Growers and Shippers (Texas Growers), a non-profit association representing growers and shippers throughout the state. The primary grounds for its

opposition is that the proposed rates would alter existing rate relationships between Texas and Florida. It is asserted that Texas and Florida shippers sell the same produce in the same markets in the eastern and central states. Growing costs are said to be about the same in the two states. Thus, transportation charges can determine which area is going to sell in a particular market. Texas Growers show examples of rate disparities which, it is claimed, would prohibit Texas shippers from selling in various markets. The proposed rates, it is stated, would, for example, result in a disadvantage of 77 cents per crate of cabbage to Texas shippers in the Buffalo market. Sales are said to be lost on a difference of 10 or 15 cents per crate. The Florida rates on this traffic are shown to be generally below the rates proposed on Texas traffic, and to yield lower car-mile earnings.

A wholesaler of fresh fruit and vegetables, located in Cincinnati, Ohio, who distributes these commodities within a 250-mile radius of Cincinnati, testified that Florida and Texas are competitive on carrots, cabbage, parsley and various green vegetables in his market. He stated that the proposed rates will substantially reduce his purchases from Texas, and that Texas may be lost as a source of fresh produce.

The Texas shippers assert that their industry has been subject to increased costs for seed, fertilizer, water, insecticides, labor and taxes. Already, it is claimed, there are fewer and fewer growers in the Rio Grande Valley each year. Growers testified that if the proposed rates become effective they will either go out of business or restrict operations to nearby areas. They claim they will derive no advantage from the proposed higher minima. because of loading and marketing problems associated with large shipments. Florida has an advantage on shipment weights also.

If the proposed rates render rail service uneconomical, these shippers do not believe that there will be enough

trucks available to handle the fresh produce traffic (about 20 percent of the total) moving from Texas. There have been shortages of trucks during recent shipping seasons. Although the preponderance of this traffic from both Texas and Florida now moves by truck, these shippers claim that the lower rail rates from Florida will tend to hold the corresponding exempt truck rates down, while the proposed rates will permit the truckers hauling from Texas to raise their rates.

The Texas protestants also object to proposed restrictions on diversion and stop-off privileges. They complain that the proposed penalty rule applies on traffic from California, but not from Texas.

The railroads state that the present rates were established for the RS-type cars, and that the adjustment involved here is intended to cover the costs of providing transportation and sufficient revenues to permit the carriers to invest in the more expensive, and larger, mechanical refrigerator cars. They acknowledge that some of the commodities cannot be loaded at the higher minimum weights proposed, but they think it necessary to provide an incentive to heavier loading where possible.

They note that a relatively small portion of this traffic is now moving from either Florida or Texas by rail. Therefore, the contention is made, that truck rates are controlling in determining the marketability of fresh fruits and vegetables originating in both states.

The contention is made that the level of rail freight rates play no significant role in the marketing of fresh produce. To support this, figures were adduced showing that despite a rate disparity in favor of Florida, Texas increased its share of the combined Texas-Florida shipments in certain markets. (protestants claim this showing, which involves 1967-68 as a base year, is invalid because that season was abnormal for Texas because of crop losses from flooding).

The railroads further show that the present truck rates are higher than the rail rates. It is also shown that in some instances the proposed rate level results in rates lower than rates under a formerly prescribed level.

Potatoes—Colorado. The principal potato growing area of Colorado is in the San Luis Valley around Alamora, Colo., in the south-central section of the state. About 700 million pounds of potatoes are grown annually on approximately 30,000 acres in this area. Potato annual sales exceed $50 million. About 70 percent of the potatoes are of the Russet varieties, about 27 percent are red McClures and three percent are other varieties.

About 40 percent of the San Luis Valley potato production is consumed in Colorado. The major markets outside of Colorado are in the states of Kansas, Missouri, Arkansas, Louisiana, Texas and Oklahoma. In recent years there has been an overall increase in rail shipments, some of which have been to more distant markets. The following table shows the destinations of shipments originated on the San Luis Valley Central Railroad Company (SLC) in the 1973-74 season.

Destination State	Number of Carloads
Texas	708
Missouri	223
Kansas	186
Illinois	77
Maryland	53
Wyoming	52
Louisiana	49
South Carolina	44
Alabama	33
Oklahoma	30
Nebraska	25
Arkansas	24
Florida	20

Destination State	Number of Carloads
New York	13
Georgia	5
Colorado	4
Iowa	3
Virginia	2
Rhode Island	2
Pennsylvania	2
Indiana	1
Ohio	1
Total	1557

About two-thirds of the San Luis Valley rail potato shipments originates on the SLC and the balance originates on the Denver & Rio Grande Western Railroad Company (D&RGW). The lines of the SLC extend between Monta Vista and Center, Colo., a distance of 17 miles. It connects with the D&RGW at Monta Vista. SLC derived 62 percent of its revenues from potato traffic in 1973.

In 1971, SLC began to acquire a fleet of 450 large-sized RS cars from REA Express. These cars, acquired new by REA in 1957, with scheduled maintenance are expected to be retired with an average age of 32 years, giving them about 15 years of remaining service life. They measure 50 feet, inside length, and can load 75,000 pounds of potatoes. The San Luis Valley potato shipping season extends from mid-September through mid-May. Thus, except for a few shipments at the beginning and end of the season refrigeration is not necessary. Ventilation is sufficient in the fall and spring, and heater service is required in the winter. Of 2,332 rail shipments of potatoes from the San Luis Valley in the 1973-74 season, 2,219 shipments moved in RS cars, 102 shipments moved in "conditionaire" cars and 113 moved in mechanical refrigerator cars. SLC has none of the latter cars. When

they are required they are furnished by the major car line companies. Unlike movements of perishable traffic from other areas, rail participation in the San Luis Valley has increased dramatically in recent years. In the 1971-72 season, 11,375 tons of potatoes originated on the SLC. This increased to 31,000 tons in the 1972-73 season, and to 51,672 tons in the 1973-74 season. Total carloads shipped in 1972-73 were 1,440 compared to 2,332 carloads in the 1973-74 season.

The following table shows the present and proposed rates to the principal destinations of this traffic from Alamosa.

DESTINATIONS	PRESENT RATES	PRESENT MINIMUM WEIGHTS (Pounds)	PROPOSED RATES AND MINIMUM WEIGHTS (Pounds)			
			75,000 [1]	80,000	85,000	90,000
Dallas, Tex.	92	70,000	144	139	134	132
Houston, Tex.	119	70,000	183	173	172	164
Kansas City, Mo.	92	70,000	144	139	134	132
Chicago, Ill.	138	70,000	187 [2]	187	187	184
Smith Center, Kans.	83	70,000	112	111	102	100
San Antonio, Tex.	135	45,000	183	173	172	164
Topeka, Kans.	83	50,000	134	128	123	122
Baltimore, Md.	253	50,000	292	277	264	152
Mauldin, S.C.	213	50,000	265	254	244	133
Springfield, Mo.	99	70,000	161	153	149	147
Tampa, Fla.	230	50,000	292	274	264	252
New York, N.Y.	260	50,000	309	294	277	265

[1] Except as noted.
[2] Minimum weight 80,000 pounds.

Evidence in opposition to the proposed rates was presented by the San Luis Valley Shippers Association, the Colorado Potato Growers Exchange, (Exchange) and individual shippers and Associations. The former is an association of 13 large shippers accounting for about 70 percent of the potatoes grown in this area. The Exchange is a cooperative association which acts as the manage-

ment, marketing and traffic organization of potato and onion cooperative associations in Colorado. The Colorado Department of Agriculture intervened as protestant.

The protestants contend that since movements of its traffic are nearly all in RS cars, the justification offered by respondents, namely, costs of refrigerator cars, does not apply to their traffic.

They assert that the present fleet of SLC RS cars is more than adequate for their shipping needs. These cars, it is stated, could handle 60 percent of the potato traffic, whereas not more than 30 percent of that traffic is presently moving by rail. These protestants find the RS cars are cheaper to use than mechanical refrigerator cars because there is no charge for ventilator service and the heater service is cheaper than mechanical protective service charges.

The protestants state that if the proposed rates become effective virtually all of the traffic will be diverted to trucking. According to their data, the present rail rates are lower than the prevailing truck rates in nearly every instance; under the proposed rates the truck rates would be lower. They attribute the recent success of the railroads in increasing their share of this traffic to reduced rates published at the higher minimum weight of 70,000 pounds.

These protestants object to the changed relationship that the proposed rates would effect between their rates and rates proposed on Idaho potatoes. They show that the proposed rates for San Luis Valley would yield higher car-mile earnings, and constitute a higher percentage of Class 100 rates than the proposed Idaho rates. To certain destinations where the distance is less from San Luis Valley origins, the Idaho rates are made applicable to San Luis Valley shipments.

The S&RGW, in rebuttal, states that it intends to initiate any rate reductions necessary to retain this potato traffic, provided that compensatory levels of return can be maintained. It states that the proposed incentive rates for 90,000 pounds to the east are truck competitive whether the exempt truckers raise or lower their rates. It contends that the proposed rates will allow the truckers to raise their rates and thereby recoup some of their increased costs. It states that it "cannot estimate with any accuracy what effect this would have on the present rail-truck differential."

TOFC Traffic. TOFC rates on this traffic were first published in 1962, initially as per 100-pound rates, and subsequently as per car rates. The per car rates were based on the TOFC hundredweights or carload rates applicable on shipments moving in 50-foot mechanical refrigerator cars. In 1970, the TOFC rates to the east were restructured, and were related to carload rates on a per carton basis. Virtually all of the previous and existing rates were published for Plan II¼ service, i.e., carrier owned trailers, carrier pickup at origin and shipper delivery from ramp at destination.

The proposed rates are published for Plan II¼ service, as well as for Plan III service, the latter reflecting the lower costs of shipper provided trailers. The proposed rates are published at 70,000 or 80,000 pounds minima, two trailers per flatcar.

The railroads state that previous efforts to relate TOFC rates to carload rates proved to be mistaken because of their inability to attract back-haul freight for the vans. Therefore, they have concluded that each service, TOFC and carload, must be considered separately. TOFC service is stated to be the most expensive to perform. The railroads consider TOFC service to be more flexible and expeditious because no car switching is required at origin, and delivery is accomplished over streets

at destination, eliminating much destination car switching. They contend that the proposed increased rates and rate restructuring are necessary to put TOFC service on a compensatory level. They consider their past experience with TOFC service to have been disastrous, and have no plans to acquire new trailers to replace those being retired.

One of the principal protestants to the proposed TOFC rates is Bud Antle, Inc. (Antle). It is a major California-Arizona producer of lettuce and celery, with an annual volume of approximately 10 million cartons of lettuce and 1½ million cartons of celery.

Antle considers TOFC service to be the ideal mode of transporting fresh fruits and vegetables. Presently it has about 236 trailers under a long-term lease which has about 30 months to go. It would prefer to continue using these trailers beyond the present lease. It contends the railroads are pricing TOFC service, and service in smaller mechanical refrigerator cars, out of existence. It asserts that the proposed rates would foreclose almost all of its TOFC sales in the east, and reduce or terminate such sales elsewhere.

To illustrate its claim that TOFC service would be improperly priced under the proposed rates, it shows that costs per carton of lettuce or celery would be increased more under the TOFC rates than under the carload rates for all but the smallest cars and that the percentage increases are greater for the TOFC rates. For example, the transportation charges to New York on lettuce would be increased from 40 to 56 cents per carton on what is considered a marketable shipment. The increased costs per carton for Plan II¼ service would range from 95 to 139 cents. The increases in the compared carload rates per carton, would range from 24 to 29 percent, while the Plan II¼ rates, per carton, would be increased by more than 70 percent. It contends that the

proposed rate level applicable on shipments exceeding 60,000 pounds will seldom, if ever, be used because it is not practical to load and market shipments exceeding that weight.

Antle developed an alternative structure of rates, which it proposed to the carriers. Its proposal would allegedly provide the same amount of revenue to the carriers for Plan III TOFC service as the carload rates provide for mechanical refrigerator service after deduction of car rental expenses and mechanical protective charges, which are paid to the owner of the equipment. These rates, lower than those proposed here, were not acceptable to the railroads.

Antle opposes all of the proposed TOFC rates, except Plan III rates published to Chicago from some origins, and its acceptance of those Chicago rates depends on approval of the corresponding carload rates.

Eastern Receivers. Evidence in opposition to the proposed rates was adduced by the Buffalo Produce Exchange, which has 30 members engaged in the jobbing, wholesaling and distribution of fresh produce. In 1973, it handled 10,283 cars of produce and 244 TOFC shipments. It complains of the published schedules under which it would not have cars scheduled for placement in its yard before the eighth morning on California shipments. At one time, California deliveries were received on the sixth morning. It objects to the proposed rate increases, which it asserts average between 25 and 50 percent for less service than is presently provided. It claims the rate increases proposed will increase diversion to trucks, especially on tomatoes.

George Tiefer, Inc., a wholesale jobber of fresh fruits and vegetables for supermarkets and retailers, located in Bronx, N.Y., also appeared in opposition to the rates. It handles approximately 1,300 cars, 350 TOFC shipments

and 2,000 truckloads of products annually. It states that it is experiencing adverse consumer reaction as a result of rapidly rising food costs. It contends that the quality of service being rendered by the railroads does not warrant increased rates.

This receiver gets delivery of its cars near Port Morris. Its deliveries of California shipments are not received until the eighth morning, whereas seventh morning delivery is provided at nearby Hunts Point. Since both receiving points take the same rates, it contends it is being discriminated against.

It also complains of deteriorating rail service and increased damage to freight. It further contends that the proposal rates unduly prefer carload traffic to the TOFC traffic.

Hills Supermarkets, Inc., Brentwood, New York, (Hills) which operates 69 stores in that area, presented a witness in opposition to the proposed rates. Its receiving yard is located on the Long Island Railroad. The same witness also testified on behalf of the Freight Users Association of Long Island, Inc., an association of about 60 Long Island shippers and receivers, and the Shippers National Freight Claim Council, Inc., an association of over 300 shippers and receivers of freight. That association is concerned with freight loss and damage claims and related policies and carrier practices.

Hills receives over 1,000 cars of fresh fruits and vegetables annually. Formerly, it handled TOFC shipments, but because of excessive damage to the produce occurring under this mode of transportation, it has virtually eliminated TOFC shipments. It states that while scheduled delivery times are published for stations in Brooklyn none is published for Long Island receivers. It further contends that the published delivery schedules allow excessive delivery times.

The witness states that the previous deplorable service it had been receiving has recently improved. He believes that better service reduces car detention, per diem and interchange costs, and that these reductions should be reflected in the rates.

The witness testified that Hills presently uses rail on the majority of produce it receives from western states, but that if the proposed rates become effective, it will divert those shipments to truck, as it is unable to pass the increased rates on to the consumers. It objects particularly to the increased TOFC rates and shows instances where the increases in these rates would be as much as 76 percent, without inclusion of the mechanical refrigeration charges. Objection is also made to the failure to include a substitution car rule in the proposed tariff.

The witness contends that the proposed penalty rule violates section 20(11) of the Interstate Commerce Act in that it would enable carriers to evade liability for full actual loss, damage or injury. He argues that the proposed exceptions to the penalty payments are so numerous and broad as to render the rule meaningless. He further argues that the 30-day requirement of the rule violates section 16(3) of the act, which allows overcharges to be filed within three years from day of delivery.

The United Fresh Fruit and Vegetable Association, Bronx, N.Y., claims that the proposed rates are almost double existing rates and the published schedules allow one day longer for delivery that is now being required. It complains of heavy loss and damage claims and delayed deliveries now being experienced. It does not consider the claimed basis for increased rates, namely, to build new equipment to be valid since is questions whether such equipment will in fact be built. It views this proposal as an attempt by the railroads to nullify holddowns on this traffic granted in ex parte proceedings by this Commission.

It shows instances where the proposed rates would amount to 72 percent on its traffic and asserts any apparent reductions proposed at higher minimum weights are non-beneficial because fresh produce cannot be loaded at those minima.

Campbell Soup Company, and its subsidiaries, manufacturers of canned foodstuffs, frozen foods, frozen and non-frozen bakery goods and packaged pet foods with plants throughout the country, oppose the increased rates. It objects to the increases being applied to fresh fruits and vegetables and not other perishable freight using the same equipment. It calculates the proposed increases on its shipments of carrots as ranging from 6.7 to 51.7 percent. To one plant in Ohio the proposed rates, at the 80,000-pound minimum there would be a reduction for potatoes, but not at lower minima. It complains of delays in delivery and contends that better car utilization would result in more economical transportation and better car supply.

The National Association of Food Chains states that it does not oppose a reasonable increase on this traffic, but it wants assurance that there will be improved service. It presented extensive evidence of deteriorating service over recent years. It criticizes the failure of the respondents to make the proposed rates subject to a car substitution rule. It notes that only certain carriers propose to participate in the penalty rule, and requests that unless the rates are coupled with meaningful tariff provisions to assure significant service improvements as to both reliability and transit times, the rates be found unjust and unreasonable.

APPENDIX C

Respondents' costs are based on Rail Form A unit costs as developed by the Western Railroad Association (for the Western and Eastern Railroads) and by the Southern Freight Association (for the Southern Railroads), by application of the Commission's Rail Form A Cost Formula to the 1973 expenses and statistics of the rail carriers involved. Rail Form A unit costs were developed for a total of 30 railroads handling the perishable traffic, i.e., 10 railroads in the West, 12 in the East and 8 in the South. These unit costs were indexed from 1973 to a April, 1974 cost level utilizing the updating procedure outlined in the Commission Statement No. 2-58, *Rail Carload Cost Scales by Territories as of January 1, 1958*. Updating factors were developed separately for the West, East and South. The updating factors developed are 13 percent in the West, 13.8 percent for the East and 12.5 percent for the South.

Respondents state that in order to more precisely reflect the actual costs of the perishable movements the following adjustments were made to the Rail Form A costs.

—the application of the Rail Form A unit costs of the principal railroads which handle perishable traffic to their respective portions of the rail movement;

—the use of individual railroad mechanical refrigerator car empty return ratios rather than the regional averages;

—the use of the average tare weight for cars of mechanical designation RP and RPL as developed from the AAR Umler File;

—the use of car ownership costs based on the 1973 average for all mechanical refrigerator cars of the five major railroad-owned carlines and the Santa Fe;

—the use of loaded miles of haul over the actual route of movement;

—the use of an actual count of interchanges rather than the development of interchange costs on a car-mile basis;

—the adjustment of the 1973 costs to the April 1, 1974 level; and

—the development of an average loss and damage cost per hundredweight for each commodity group on the basis of the 1973 claim payout experience of the major railroads handling the perishable traffic here at issue.

Traffic Study

Respondents' traffic study is based on a ten percent traffic sample of all waybills ending in the number 1 for six Western Roads who originated perishable traffic in 1973. Respondents indicate these six railroads, Burlington Northern, Santa Fe, Union Pacific, Southern Pacific, Western Pacific and Missouri Pacific collectively originated (directly or on short line connections) about 98 percent of the eastbound perishable traffic under consideration in 1973. These six railroads provided a computer tape, developed from the sample waybills, containing the car number, commodity, origin city, destination city and each railroad and junction handling the car.

The computer tapes submitted by the six railroads were then computer processed to develop route segments consisting of delivering road-junctions, possessing road-junction and receiving road. For example, a movement via origin - UP - Fremont - CNW - Chicago - PC - destination. The route segments were then sorted by possessing road and the waybill information was sent to each road in printout form. Each line in turn was asked to provide the actual operating mileages over their particular segment plus the destination rate group involved.

For the trailer on flatcar traffic, the highway mile to the rail ramp and the rail miles beyond were provided by the railroads involved. Railroads were also asked to provide the points at which highway interchanges of trailers were made.

The route segment miles and rate information obtained from the involved railroads were then applied to each sample waybill by computer process. Thus for each sample waybill, the operating miles identified by carrier and territory (West, East and South) were shown together with the actual number of interchanges and rate group.

The above 10 percent traffic sample produced 20,378 total waybills for study.

Application of the Cost to the Traffic Statistics

Next, the individual Rail Form A unit costs were applied to the traffic statistics developed above to obtain cost scales for the perishable traffic. Respondents' Exhibit 35 summarizes the results of the cost study and compares the present and proposed rates with the variable costs shown. These variable costs were developed for various origin groups and cities representing destination rate groups. Respondents show car related costs separately from net load related costs in order to evaluate the cost of handling various loadings in a particular size car. The car related costs were obtained by determining a basic unit cost under the individual carrier's Rail Form A developed by respondents, multiplying these unit costs by loaded car miles, and then adding the cost of interchange and terminal expense. Loaded car miles were developed from the average origin to common points on the service route. The mileage over each route was combined into a composite mileage according to the percentage of traffic originated by each line. The interchange portion of the line haul costs were derived by taking the weighted average number of interchanges and applying

it to the interchange cost per interchange taken from the applicable Rail Form A for the respective railroad. Terminal costs on a per-care basis were also taken from the appropriate carrier's Rail Form A application.

Net load related costs were obtained by adding terminal costs, loss and damage and line haul cost per hundredweight. The basic unit costs were then combined and costed out based on the involved minimum weights to arrive at a variable cost per hundredweight.

The end results were tested for statistical significance by use of a standard error calculation and those sample summaries in Exhibit 35 which had a standard error exceeding 50 miles were considered unreliable and were excluded. Resondents state that this was due to the fact that some rate groups received too little traffic to produce an acceptable standard error.

In addition, respondents submitted Exhibit 36 later revised as Exhibit 39 which shows the same rates and commodity groupings as Exhibit 35, however, the Rail Form A costs were modified to include a cost of capital of 13 percent after taxes on new refrigerator cars and locotives.

Respondents indicate that before the higher cost of capital was added, the return and depreciation already included for locomotives and cars were first removed from the unit costs. The annual before tax cash needed to return 13 percent after taxes as well as recovery of the initial investment in locomotives and refrigerator cars was then added to the Form A costs. The investments in the refrigeration unit was excluded from this calculation. The 13 percent cash requirement was added to the car mile cost in the case of the refrigerator cars and to the cwt-mile cost in the case of locomotives. A detail development of these costs are shown in respondent's Exhibit 37. The car-mile cost of

18.9283 cents [1] used in Exhibit 39 replaces the cost of 7.0605 cents used in Exhibit 35.

Respondents' TOFC Cost Study

Respondents also developed variable costs associated with the movement of fresh fruits and vegetables in Plan II¼ and Plan III TOFC service. Costs were developed separately for 70,000 pound shipments and 80,000 pound shipments based on two trailers loaded on the same flat car moving from points in the Northern and Southern Pacific territory to various destinations in the Official territory. Respondents' TOFC costs are based on Rail Form A unit costs as developed for the individual rail carriers involved based upon each carrier's 1973 TOFC operations and indexed to a April 1, 1974 level. The method used in computing and indexing the costs was reported to be the same as that used in compiling the mechanical refrigerated costs.

Respondents made several adjustments to the Rail Form A unit costs in order to develop more representative TOFC costs for the movements at issue. These adjustments, which have been explained but not illustrated, are described below.

Trailer pickup and ramping costs were based on an average cost of the originating railroads, weighted for the number of shipments originating on each railroad. The average costs for each railroad was based on the pickup and ramping cost at each station, weighted according to the number of shipments originating at each station.

Trailer deramping costs at destination were similarly developed. When the actual cost of deramping at the destination point was not known, the average cost of the de-

[1] The 18.9283 cents was later revised to 16.3628 cents per Respondent's Exhibit 38".

ramping railroad was used, developed in accordance with Rail Form A.

On shipments routed through the St. Louis or Chicago gateways, the flat car does not go through to the Eastern railroads and the trailers must be interchanged over the highway. Respondents indicate for these shipments actual costs for deramping, drayage and ramping were used to the extent possible. Regional average Rail Form A costs were reportedly used when actual costs were unavailable.

Respondents developed an average loss and damage cost based on the weighted average loss and damage experience for all commodities of the major railroads handling perishable traffic in 1973.

With respect to the ratio of loaded to empty car miles, the same 100 percent empty return was reportedly used for the mechanical refrigerated trailers as well as for the flat cars. Further, the Rail Form A unit costs were adjusted to reflect tare weights of 33.4 tons for a 89 foot TTX flat car and 8.4 tons for trailers. These tare weights were based on the Santa Fe Railway's average tare weight experience in 1973 for flat cars and trailers.

In addition, the TOFC costs under Plan II¼ were adjusted to include a 10 percent return on investment after taxes on the trailer. Since the shipper furnishes the trailers under Plan III, no costs of ownership was included under this Plan. In computing rental costs for the trailer body, respondent used $14,000 as the "cost of reproduction new". Table 1 below describes how the trailer cost per day and trailer cost per mile factors were developed.

TABLE 1

1. Current purchase price of 40 ft. refrigerator trailer less refrigeration unit	$14,000.00
2. Annual cash flow needed to recover investment	$ 2,702.45

3. Cost per trailer day—(Line 2 × Overhead ratio) ÷ 305 days	$	10.22
4. Maintenance expense per day (excluding mechanical unit)	$	1.88
5. Total cost per day—Line 3 + Line 4	$	12.10
6. Total cost per mile		
(1) Region VII—Line 5 ÷ 478 miles	$	.02531
(2) Region III—Line 5 ÷ 339 miles	$	.03569

Unlike Rail Form A costs, respondents excluded the mechanical refrigeration unit from its cost calculation.

Respondents obtained the miles per trailer day from ICC Statement No. 1C1-70, *Rail Carload Cost Scales by Territories for the Year 1970*. The overhead ratio was taken from the Santa Fe Railway's Rail Form A. The maintenance expenses were taken from the Santa Fe Railway's Annual Report for 1973, Account 318, (Highway revenue equipment—repairs). These expenses were divided by the total number of trailers under lease to arrive at a cost per trailer.

The results of respondents' TOFC cost study are shown in respondents' Exhibit 62. The method of cost computation was based on Table 17 of ICC Statement No. 1C1-70, *supra*. The traffic statistics used in developing the costs were from the same 10 percent waybill sample as used for the computation of mechanical refrigerated costs. The 10 percent waybill sample resulted in 860 TOFC shipments being selected for costing.

Respondents assumed that the ATSF, BN, PFE, SP, UP and WFE furnished all the trailers in the 860 sample of TOFC shipments. Since the Santa Fe Railway accounts for approximately 47 percent of the total refrigerator trailer fleet, ATSF experience was used in computing the above trailer rental costs.

In computing the TOFC costs in Exhibit 62, respondents indicate that each rail carrier's individual Rail Form A unit costs was weighted by that carrier's participation between any origin and destination pair based on the 10 percent traffic study. An illustration of this weighting process however was not shown by respondent.

The difference between the Plan II¼ and Plan III costs as presented in Exhibit 62 lies in trailer ownership, origin pickup and the empty return ratio.

Under Plan II¼ the railroads must furnish the trailer, and are responsible for hauling the trailer to the shipper's dock for loading of the commodity and hauling it back to the TOFC ramp for loading onto the flat car. Loading of the trailer onto the flat car (ramping) and unloading it from the flat car (deramping) are performed by the railroads or their agents under both Plan II¼ and Plan III. Under Plan III no trailer ownership or drayage costs are incurred by the railroads. However, the railroads are obligated to return the emptied trailer to the origin ramp.

Respondent indicate Exhibit 62 does not include a 13 percent after tax rate of return as was included in Exhibit 35 but only a 10 percent return on the trailer body. However, to illustrate the impact of a 13 percent return on trailers and locomotives, the cost to stations coded "T-1" in Exhibit 62 at the 80,000 pound level would increase from 244.469 cents to 285.190 cents per hundredweight for Plan II¼ and from 199.711 cents to 240.388 cents per hundredweight for Plan III.

Respondents also introduced Exhibit 12, recapped as Appendix C hereto, which shows a comparison of the present and proposed TOFC rates with the variable costs taken from respondent's Exhibit 62. Revenue to cost comparisons are shown separately for 70,000 pound shipments and 80,000 pound shipments moving from points in California, Arizona and Northern Pacific territory to various destina-

tions in the East. The present rates are shown from the above three origin points but no distinction is made between Plan II¼ and Plan III. Conversely the proposed rates are not shown from any specific origin and are identified as either Plan II¼ or Plan III. Respondents indicate in most instances the present rates fail to cover variable costs.

TEXAS STUDY

Respondents also submitted two statements, Exhibit No. 65 and Exhibit No. 66 which show the movement of perishables in mechanical refrigerator cars from two origins, McAllen and Crystal City, Texas to fifteen destination stations throughout the East and South at various minimum weights. The origin stations were selected as being representative of traffic originating in the Lower Rio Grande Valley and from the "Winter Garden" area. The destination stations were selected from the fruits and vegetables unload statement issued by the USDA Agricultural Marketing Service in Washington as being some of the principle unloading points for perishable traffic. Respondents show for each destination, the present rate. the variable cost, and the proposed rate, all in cents per hundred pounds and the resulting proposed rate to the variable cost ratios.

Respondents state that the mechanical refrigerator car costs for these movements were developed in the same manner as shown in its Exhibit 35. That is, the costs are weighted averages and were calculated according to each railroad's amount of participation in the perishable traffic. Using a waybill sample of all waybills ending in the number one, the number of originations and terminations were computed for each of the railroads. After the percent of participation was developed, this percent was multiplied by the applicable terminal costs for that particular railroad. The portions of the terminal costs were then added together representing an aggregate of all costs for all roads.

The line haul costs were similarly developed, using total perishable car miles on each road as the apportionment factor.

Respondents indicate that freight train car expenses were supplied by the Pacific Fruit Express Company. All other costs for each road were reportedly developed through application of the Commission's Rail Form A Cost Formula to the expenses and statistics of the involved railroads for the year 1973, indexed to April 1, 1974 level. The unit cost thus developed were applied to the service units of the sample traffic. The costs include a 13 percent cost of capital applied to current cost of cars only.

As can be seen in respondents' Exhibit 65 the proposed rate to cost ratios on shipments from McAllen, Texas to various destinations, ranged from a low of 109 percent for a 70,000 pound shipment to a high of 139 percent on a 90,000 pound shipment. For shipments moving from Crystal City, Texas to the various destinations shown in Exhibit 66, the proposed rate to cost ratios ranged from a low of 107 percent for a 90,000 pound shipment to a high of 139 percent also on a 90,000 pound shipment. The variable costs exceeded the present rates on all of the movements shown from both origin points.

PROTESTANTS' COST EVIDENCE

Protestants, Idaho Potato Commission, Idaho Growers Shippers Association and Idaho-Oregon Fruit and Vegetable Association as a group take the position that respondent have failed to show that the suspended rates are just and reasonable. To support this position protestants engaged a transportation consultant to review and analyze the evidence submitted by respondent and further to determine the compensativeness of the present rail rates on potatoes and onions originating in Idaho.

Protestants state that respondents cost study treated the entire State of Idaho as a single origin area for potato and

onion traffic. This treatment however fails to give consideration to the substantially different rate and transportation characteristics between potato and onion traffic originated in Western Idaho and potato traffic originated in Eastern and Central Idaho. Further protestants point out that respondents treated potato and onion traffic originated in Eastern Oregon, which has rate and transportation characteristics similar to that of Western Idaho, as North Pacific Coast traffic. This reportedly overstates the North Coast traffic and understates the Idaho/Eastern Oregon traffic. Moreover, protestants contend the inclusion of the Idaho portion of the Idaho/Eastern Oregon traffic with the Eastern and Central Idaho traffic and the inclusion of the Oregon portion of the Idaho/Eastern Oregon traffic with the North Coast traffic, totally obscures the rate and transportation characteristics of the Idaho/Eastern Oregon traffic.

Protestants also state that there are vast differences in rates between Eastern and Western Idaho. For example, it is noted that the proposed rates for Western Idaho (Nampa, Idaho) are 8.0 cents per hundredweight higher than the rates from Eastern Idaho. Further, it was pointed out that various minimum weights apply on perishable traffic from Eastern and Central Idaho and Western Idaho.

Protestants found no fault in respondents' adjusting the Rail Form A costs to more accurately reflect the actual costs of handling the perishable traffic in mechanical refrigerator cars. However, it is protestants' contention that the adjustments made by respondent railroads fail to adequately reflect the cost of handling Idaho potato and onion traffic. Protestants were especially critical of respondents' car cost adjustment. For example, they point out that the use of average 1973 costs as developed by respondents for mechanical refrigerator cars do not properly reflect the actual car costs incurred in handling the traffic because:

(1) They do not include the lower costs of the RS or bunker type cars which protestants claim carried 51 percent of the 1973 sample Idaho potato and onion traffic. This was based on a study of 2,210 sample cars which hauled Idaho potatoes and onions in 1973. The results of this study are shown in protestants' Exhibit 126, Appendix D through F. Protestants show that 87 percent of the Western Idaho potato and onion originated traffic was handled in bunker cars with only 13 percent in mechanical refrigerator cars. In Eastern and Central Idaho 46 percent of the originated traffic was handled in bunker cars and 54 percent in mechanical refrigerator cars. Therefore, the only significant use made of mechanical refrigerator cars in handling the potato traffic was in Eastern and Central Idaho.

(2) They include the costs of two carline companies (FGE and WFE) along with the Santa Fe which did not supply any cars for the movement of the 1973 Idaho potato and onion sample traffic. Moreover, the cost study does not include the costs of the Bangor and Aroostook and San Luis Central cars which reportedly carried 6 percent of the 1973 Idaho sample traffic.

By using only mechanical refrigerator cars in its cost study, protestants maintain respondents have overstated the car ownership costs. Further, protestants point out that respondents' costs would be overstated even if all the traffic had been handled in mechanical refrigerator cars. This is because 94 percent of the total cars (bunker and mechanical) furnished by carline companies were PFE cars and 100 percent of the mechanical cars were PFE. For this reason protestants conclude that the most accurate presentation of car costs would be to use the PFE mechanical refrigerator costs developed by respondents in Exhibit 40 Th-3 (Revised). The PFE mechanical refrigerator car costs as of the April 1, 1974 level was 6.6546 cents per mile, or 94.3 percent of car costs used by respondent of 7.0605 cents per mile in its cost study.

Protestants state that the car costs could have been made even more accurate by adjusting the U.S. average tare weight for all RP and RPL cars to the average tare weight of Pacific Fruit Express's RP and RPL cars for the Idaho traffic. However, the necessary data was not available to make this adjustment.

Protestants also criticize respondents' method of adjusting the costs to the April 1, 1974 level. For example, even though the method outlined in Commission Statement No. 2-58, *supra*, was reportedly followed, protestants contend that a slightly different and unknown procedure was used in computing the index for the Southern region than was used for the Eastern and Western Regions. In the Southern region the index reflects an increase of 4 percent effective January 1, 1974 for wage divisions 907 and 908 applied to the total compensation chargeable to operating expenses for the year 1973 whereas in the Eastern and Western region an increase over 1973 and 4.5 percent and 4.8 percent respectively was reflected. Likewise in the Eastern and Western regions the average increase in fuel prices and materials and supply prices as determined from the AAR's wage and price indexes were used. In the Southern region somewhat different procedures were used.

Protestants state the above method of inflation shows the costs that would have occurred in 1973 if the labor rates, material, and supply prices and fuel costs at the April 1, 1974 level had been experienced throughout the year 1973. However, it does not produce the cost actually incurred in handling the traffic as of April 1, 1974 because it gives no consideration to possible changes in the traffic volume and service units, method of operations, reductions in labor forces, the use of lower cost labor, or efforts to reduce the consumption of fuel or materials and supplies.

Moreover, protestants state that respondents failed to adjust intertrain and intratrain switching costs to reflect the actual number of switches, but rather included such switch-

ing costs on the basis of car miles. Protestants state the cost per car mile for intertrain and intratrain switching as included in the line haul cost in respondents' Exhibit 35 are based on Union Pacific's system average costs for this service of 1.5775 cents per loaded or empty car mile. The cost per loaded car mile is 2.772 cents (1.5775 cents x 1.76 empty return ratio). Protestants state the following table shows the costs respondents assign to this service between Idaho Falls and the Union Pacific's principal interchange points on the movement of Idaho potato and onion traffic.

TABLE 2

Union Pacific Intertrain and Intratrain Switching Costs Included In Respondents' Exhibit 35

Idaho Falls To (1)	Loaded Miles (2)	Cost Per Car* Year 1973 Level (3)	Cost Per Car April 1, 1974 Level** (4)
Kansas City	1,227	$34.01	$38.43
Grand Island	965	26.75	30.23
Fremont	1,073	29.74	33.61
Council Bluffs	1,112	30.82	34.83

* Column 2 x 2.772 cents per loaded mile
** Column 3 x 1.13 from Exhibit KB-3, Page 2

Protestants note that the Union Pacific's costs on a per car basis for 1973 was $5.56 per loaded car switched ($3.16 per loaded or empty x 1.76 empty return). At the April 1, 1974 level, the cost was $6.28 per loaded car ($5.56 x 1.13 inflation factor).

Protestants state that based on respondents' testimony in this proceeding between Idaho Falls, Blackfoot, or Pocatello and Kansas City there would be two intertrain switches on the Union Pacific of the Idaho cars—one at Idaho Falls, Blackfoot, or Pocatello, and one at North Platte. Thus, based on the intertrain and intratrain switch-

ing costs above of $6.28, the cost for the two switches would be $12.56 per loaded car switched which is $25.87 per car less than the $38.43 shown in the table above and reflected in respondents' Exhibit No. 35. This cost reduction would be 4.3 cents per hundredweight for the 60,000 pound shipments and 3.2 cents per hundredweight for 80,000 pound shipments.

On shipments to the Grand Island, Fremont, Council Bluffs interchange points, protestants indicate it is not clear whether the train from Idaho Falls is terminated at North Platte, or if it goes on to Council Bluffs. However, if the former is the case, then the intertrain switching costs on a per car switched basis for this traffic would be the same as for the Kansas City traffic, $12.56 per car. If the latter is the case, the costs would be $6.28 per car as there would be no switching of the cars at North Platte.

Further, protestants state that if it is assumed that the cars are switched at North Platte, the cost for the shipments would be reduced by $17.67, $21.05, and $22.27 per car, respectively. This is a reduction in cost per hundredweight for the 80,000 pound minimum weight shipments of 2.2 cents to Grand Island, 2.6 cents to Fremont, and 2.8 cents to Council Bluffs. For the 60,000 pound minimum weight shipments the cost per hundredweight would be reduced by 2.9 cents to Grand Island, 3.5 cents to Fremont, and 3.7 cents to Council Bluffs.

Based on the above findings, protestants restated the variable costs in respondents' Exhibit 35. This restatement reflects PFE's car costs for mechanical refrigerator cars and the calculation of the Union Pacific intertrain and intratrain switching costs based on the number of actual switches. It shows the total year 1973 variable costs and the year 1973 variable costs at the April 1, 1974 and October 1, 1974 level of costs. Protestant states that the method used to index the 1973 costs of the October 1, 1974 level was

substantially the same as that used by respondents in updating the costs to the April 1, 1974 level.

Protestants state that there are two other areas besides car costs and intertrain and intratrain in which respondents' variable costs are overstated. These two areas are loss and damage and interchange switching.

Protestants note that respondents show an average loss and damage cost for all potato and onion traffic combined of 4.80 cents per hundredweight. This cost was based on the 1973 claim payments and revenue received by the principal railroads handling this traffic. However, a review of respondents' working papers for the five major originating railroads of potato and onion traffic in 1973 revealed that the Union Pacific had the lowest ratio of claims to revenue. Protestants contend that the Union Pacific is the sole originator of Idaho potato traffic and Idaho potato traffic makes up a substantial portion of the Union Pacific's total potato traffic. Therefore, protestants conclude that respondents' own study shows that the claims paid on Idaho potato traffic are less than the average used to calculate the loss and damage claims per hundredweight of 4.80 cents. Further, protestants note that the claims paid on Idaho potatoes and onion traffic combined are less than the average used by respondents.

Protestants also state that testimony presented in this proceeding indicated that a portion of the Idaho interline traffic is handled in run-through trains, that is, the train including the power unit and probably the caboose is turned over intact to the receiving railroad at the interchange point. As a result, the switching of cars normally associated with an interchange does not occur.

One such train is the train operated out of North Platte in conjunction with the Union Pacific, Chicago and Northwestern and the Penn Central. Based on respondents cost calculations, Idaho potato and onion cars using this route

and train would be charged with a cost of $58.58 per car for interchange switching even though the car actually received no interchange switching. Thus, protestants argue the variable costs on movements of Idaho potatoes and onions using this route are overstated by 7.3 cents and 9.8 cents per hundredweight for the 80,000 and 60,000 pounds minimum weight shipments.

Protestants developed recalculated ratios of the average rates to variable costs. It is protestants contention that these ratios more accurately reflect the costs incurred by the respondent railroads in handling Idaho potato and onion traffic in mechanical refrigerator cars. The overall average rates on the 80,000 pound shipments exceed the variable costs of handling Idaho potato and onion traffic in mechanical refrigerator cars by amounts ranging from 29 percent at the year 1973 level, to 39 percent at the October 1, 1974 level. The overall average rates on 60,000 pound shipments exceed the variable costs by amounts ranging from 15 percent at year 1973 level, and 23 percent at the October 1, 1974 level.

Protestants have also calculated the estimated annual contribution of Idaho potato and onion traffic to the railroad fixed cost and profits. For the 80,000 pound minimum weight shipments protestants show the annual contribution to range between 6.8 million dollars at the April 1, 1974 rate and cost level and 10.6 million dollars at the October 1, 1974 average rate and restated cost levels. For the 60,000 pound minimum weight shipments the estimated annual contribution ranges between 2.8 million dollars at the April 1, 1974 rate and cost levels, and 6.0 million dollars at the October 1, 1974 rate and restated cost level.

Protestants state that the revenue cost ratios and annual contributions estimates mentioned above are based on the costs which:

1. Assume that the 51 percent of the 1973 Idaho potato and onion traffic which actually moved in RS or bunker cars moved in the higher cost mechanical refrigerator cars.

2. Do not include protestants adjustment to reflect the lower costs of interline Idaho potato and onion traffic that moved out of North Platte in run-through trains; and

3. Already include a before tax rate of return of almost five percent on 100 percent of the net investment in equipment, and 50 percent of the net investment in road property.

Protestants, Colorado Potato Growers Exchange, Washington Potato Association, Texas Citrus and Vegetable Growers and Shippers Association and Sunkist Growers, Inc. also engaged a cost consultant to analyze and restate, if necessary, the cost data submitted by respondent railroads.

Protestants point out that the application of Rail Form A by Southern Freight Association appear to be consistent with the procedures recognized by the ICC. However, the Formula applications by the Western Railroad Association contained some fundamental errors.

For example, the working capital needed for carrier operations should be limited to the carrier's cash balance at the end of the year. However, Western Railroad Association did not observe this limitation which resulted in an overstatement on seven carriers as shown below:

CARRIER	WRA	ICC	EXCESS
BN	$105,500,069	$70,328,633	$35,171,436
CNW	$ 30,547,431	$28,406,781	$ 2,140,650
MILW	$ 18,477,072	$16,478,040	$ 1,999.032
MP	$ 33,772,999	$13,066,225	$20,706,774
N&W	$ 25,889,305	$20,204,617	$ 5,684,688
SOOL	$ 16,733,341	$10,033,536	$ 6,699,805
UP	$ 64,205,715	$21,672,189	$42,533,526

Thus the above working capital which is added to depreciated investment before the cost of capital is calculated, is overstated.

Further, the WRA included total investment in property and equipment of lessor companies but failed to deduct the accrued depreciation for these assets from gross investments. For the N&W Rail Form A, protestants contend this resulted in an overstatement of $27,760,474 in investment.

Moreover, protestants note that the expenses and statistics of the BN and MILW were combined into one Rail Form A application. This results in a weighting of the combined unit costs based on system average expenses and statistics instead of the participation statistics of each carrier in the study traffic. Therefore, this improper weighting of unit costs distorts the total costs for any movement involving either of these carriers.

Finally, protestants state that the cost per cwt mile of .09451 cents for the Texas-Mexican appears in error in comparison with the Western district average of .01174 cents per cwt. mile.

Thus, it is protestant's contention that based on the above it can be seen that the proper application of the Rail Form A cost formula would have resulted in lower costs for several of the carriers handling the issue traffic. However, a lack of time and personnel reportedly did not permit new Rail Form A applications.

Protestants also claim the cost per car-mile developed by respondents are higher than can be expected for the following reasons:

(1) Respondents projected all wage increases to 4/1/74 based on the average hourly clerical rate and mechanical rate to be paid union employees. Thus the wages of all officers and other non-union personnel were improperly based on increases to be granted union employees.

(2) Respondents updated the cost-per-car-mile based on material price increases derived from the AAR Indexes of Railroad Material Prices. This publication is based on purchases reported by 11 Class I line-haul railroads in the United States and the overall average gives weight to the volume of purchases for three product groups involved. The table below, taken from the AAR publication and included in respondents' working papers, show the increases in each product group:

Product Group (1)	Year 1973 (2)	Year 1974 (3)	Increase (3 ÷ 2) (4)
Forest Products	140.0	187.7	34.1
Iron and Steel Products	129.1	149.6	15.9
Miscellaneous Products	118.1	136.7	15.7
Average	125.1	146.5	17.1

The average increase factor of 17.1 percent was used by respondents in updating the cost per car-mile. However, protestants state it is obvious that the 34.1 percent increase in Forest Products is given a much heavier weighting for railroads than would be proper for carline companies.

Protestants selected three representative movements of respondents to restate the variable costs and recalculation of the ratios of revenue to cost for present rates and proposed rates. The movements selected were as follows:

1. Citrus Fruits
   From: North Coast and South Coast
   To: Group A Except New England, A-1
2. Deciduous Fruits (Pear and Apple Rates)
   From: North Coast: All Origins Other Than Southern Pacific Points
   To: Group A Except New England, A-1

3. Potatoes Other than Sweet and Onions—Dry
From: North Coast: All Traffic From Oregon and Washington except that originating on the SP
To: Illinois (from Eastern Washington to Chicago)

The following adjustments by protestants were made to the variable costs for the above movements:

1. Terminal train supplies & expense costs were eliminated from the railroad Rail Form A costs. Protestants indicate that the cost of cleaning the refrigerator cars is included in the cost per car mile for mechanical refrigerator cars.

2. Intertrain switching costs were adjusted to reflect the handling of perishable traffic on "run through" trains in lieu of the United States average for all traffic used by respondents. Protestants have restated intertrain switching costs to reflect one switch each 800 miles in the West and one switch each 600 miles in the East and South in place of the US average 200 miles.

3. Interchange switching costs were reduced to reflect 50% of the system or regional average in the West and to reflect 75% for the East and South. Protestants state that this reduction is based on the fact that switching at interchange is normally handled in large blocks of cars requiring less switching than the system average time shown in Rail Form A.

4. Car ownership costs were recomputed on a variable cost basis. Protestants contend that the car costs as developed by respondents were on a full cost basis, therefore it was necessary to restate these car costs based on the percent variability factors as shown in the Commission Statement 1C1-72, *supra*. This resulted in a reduction of respondents' cost from 7.0605 cents per car-mile to 6.0766 cents per car mile.

5. Inflation factors as developed by respondents for the Eastern and Western regions were adjusted by protestants to include cost of capital but made no allowance for inflation of the cost of capital. Protestants aver that the proper procedure for developing the inflation factor is to allow for no increase in the cost of capital as shown by respondents in the development of the Southern Region inflation factor.

Protestants maintain that the above adjustments reduce respondents' costs in Exhibit 35 by approximately 10 percent.

Protestants further point out that respondent applied regional average Rail Form A unit costs of Class I railroad for any Class II railroad involved in the handling of the traffic. It is protestants' contention that the utilization of regional costs without adjustment will always tend to over state costs. Protestants note that regional average unit costs were also utilized for the Louisiana and Arkansas railroad when the L&A expenses and statistics are included in the Consolidated Annual Report of the Kansas City Southern. Thus protestants argue that regional average costs are higher than the Rail Form A costs of the KCS and this results in an overstatement of the costs in respondents' study on movements handled by the L&A. For example, the KCS Rail Form A unit cost per hundredweight mile is .00849 cents, whereas the same regional cost (used for L&A) is .01174 cents. In addition the KCS terminal cost is $34.38, as compared with the regional average cost of $36.16 and the regional average empty return ratio is 70 percent compared with 52 percent on KCS.

Protestants also criticize respondents' tare weight of 863 cwt. used in computing all mechanical refrigerator car costs. Protestants point out that the use of this average tare weight for all cars to calculate all costs discriminates against all lower minimum weight shipments which use the smaller cars. For example, respondents' working paper show a tare weight of 675 cwt. for the 1973 citrus loadings

of oranges or 21.8 percent lighter than the average for all cars of 863 cwt. Therefore, the tare weight costs on citrus shipments should be reduced substantially to reflect the lighter tare weight of the cars actually used.

Protestants claim respondents' loss and damage costs is overstated since it is based on a relationship of claim payments to revenue for each commodity, using only the data from a select group of railroads. A more accurate method would have been to use the loss and damage expense maintained by the AAR. These expenses are reported in total and per carload for fresh fruits and vegetables at the five digit STCC level by commodity. Protestants maintain they were unable to restate these costs to the proper level since the above information is not publicly available.

Protestants state that the rates shown in respondents' Exhibit 35 are at the Ex Parte 303-A rate level. However, they believe respondents should increase these rates another 10 percent to reflect the Ex Parte 305-A rate increase that became effective June 20, 1974. This is because the cost increases in support of the Ex Parte 305-A rate increase were based on the AAR price index for April, 1974, as stated in the Verified Statement of Witness Betts, Vice President, Economics and Finance of the AAR.

Protestants also take exception to respondents' costs shown from McAllen and Crystal City, Texas to the same 15 destination cities. Protestants aver that the use of the same weighted average unit costs for both originations is improper. Moreover, they state the costs do not reflect the proper statistics for the destinations listed or the proper routes of movement between the origins and destinations.

A restatement of respondents' costs by protestants is shown in Exhibit 128, MLH6. Protestants indicate the same adjustments were made to these costs as were made in restating respondent's costs in Exhibit 35, with the following exceptions.

(1) Intertrain switching in the West was not adjusted. However, all interchange switching between the MP and TP and between the SP and SSW was eliminated.

(2) Refrigerator car ownership costs were reduced by eliminating the 13 percent cost of capital based on depreciated value of reproduction costs.

(3) Loss and damage costs were restated to reflect a separate cost for each commodity in lieu of a single cost for vegetable and melons used by respondents.

In addition, protestants restated the revenues to a Ex Parte 305-A level to take into effect the 10 percent rate increase granted June 20, 1974.

The results of this restatement indicates that the present rates when increased to the Ex Parte 305-A level exceed restated costs for the majority of the 40,000 pound shipments, on all but three of the 50,000 pound shipments and on all of the 60,000 pound shipments.

Protestant, Red River Valley Potato Growers Association also engaged a transportation consultant for the purpose of (1) estimating the revenue impact from the instant proposal on potato growers in North Dakota and Minnesota. (2) To describe the type and value of railroad equipment actually provided to and used by Red River Valley potato growers and (3) To estimate as close as possible current variable costs, using cost information submitted by respondents in this case, for the transportation of potatoes from the Red River Valley.

With respect to the estimated revenue impact, protestant states it conducted a study which shows the rail transportation costs to the North Dakota and Minnesota potato growers will increase from $7,379,192 to $10,969,116, an average increase in the rates of 48.6 percent. Protestant's study is based on all North Dakota and Minnesota potato shipments originating at Grand Forks, North Dakota in 1973 to 41 cities as reported to USDA.

Protestant contends there are basically two types of refrigerator cars available to Red River Valley Potato Growers, the RS type bunker car and the mechanical refrigerator car. Protestant states that testimony has shown that over 75 percent of all potato shipments from the Red River Valley by rail was handled in RS type cars. An analysis of car ownership and leasing by Western Fruit Express who is the primary source of such equipment shows that there were 2,338 bunker cars of the R2 type and 823 bunker cars of R8 type in 1973. It is protestant's contention that the majority of such cars were built around 1947 through 1949 and assuming a 25-year life, this equipment is essentially "without life". That is, a 1948 model still in operation during 1974 has yielded the car owner a year of revenue at no capital costs.

Based on the above information, protestant restated the costs shown in respondents' Exhibit 39 on potato movements from the Red River Valley to eight destinations. Three adjustments were made in respondents' costs by protestant. These were (1) a mileage adjustment, (2) the substitution of a 596.5 cwt. tare weight for the 863 cwt. tare weight used by respondents, and (3) substitution of 5.9830 cents per car mile in place of the 7.2171 cents per car mile shown by respondents for ownership costs. The 5.9830 cents per car mile was reportedly taken from respondent Exhibit 40, TH-3 (revised) and reflects Western Fruit Express's costs for owning mechanical cars which were less than 50 foot in length.

The results of protestant's restatement are shown in Table 3 below: As can be seen, with the exception of the Minneapolis market, variable costs which include a 13 percent cost of capital applied to curent cost of equipment are already being covered by present revenue. Protestant notes the present rates are from 9 to 30 percent above variable costs and thus are making a significant contribution to fixed costs.

TABLE 3

Summary of Present and Proposed Rates, Variable Costs and Net Contributions of Potato Traffic from Grand Forks, North Dakota to Selected Destinations. Cents per hundredweight. Net load 600 cwt.

GRAND FORKS TO:	PRESENT REV. PER CWT.	PROPOSED REV. PER CWT.	VARIABLE COST PER CWT.[1]	RATIO PRESENT	REV. COST PROPOSED	NET CONT PRESENT	$ PER CAR PROPOSED
Chicago	107	172	90	1.189	1.911	102	492
St. Louis	113	194	104	1.087	1.865	54	540
Kansas City	113	175	93	1.215	1.882	120	492
Memphis	168	238	138	1.217	1.725	180	600
Minneapolis	45	91	55	0.818	1.655	—60	216
Birmingham	202	264	156	1.295	1.692	276	248
Atlanta	209	277	164	1.274	1.689	270	678
Louisville	161	206	128	1.288	1.609	198	468

[1] Variable costs estimated through modification of Exhibit KB-1A and where "All costs include a 13% cost of Capital Applied to current cost of equipment".

Variable costs revised per KB1-A.

RESPONDENTS REPLY TO PROTESTANTS' ARGUMENTS

Respondents state there is no merit to protestants' criticism that the working capital calculation on eight railroads were erroneous in that cash working capital used for common carrier purposes exceeded the sum reported in the annual report, Schedule 200A, Account 701, "Cash on Hand", plus investment in U.S. Treasury Notes and Bills. Respondents argues that the Commission's Form No. ACC-121A, upon which this contention was based, does not contain any instructions or limitations with regard to the calculation of working capital. Further, protestants in restating the working capital on eight railroads failed to take into consideration Account 702, "Temporary Cash Investments" which includes investments in commercial paper

and time certificates. Respondent indicate that the inclusion of this cash account in protestants' restatement of working capital would, as an example, increase the working capital shown for the MP from $33,772,999 to $88,566,225. Respondents note this is $54,893,226 in excess of the working capital of $33,772,999 which it has used.

Respondents state that protestants' criticism concerning the development of the loss and damage claim payments is without foundation. Respondents contend that it is not necessary to separate the different commodities according to appropriate loss and damage claim payments, since there is only one rate proposal for all fresh fruits and vegetables from the origin area depicted and the shipment of vegetables and melons constitute 87.25 percent of the traffic from these areas. Thus, respondents maintain the loss and damage claim expense as presented in Exhibits 65 and 66 is the appropriate figure to use in this proceeding.

Respondents acknowledge that they inadvertently omitted the accrued depreciation of lessor companies of the N&W and in the Western District as alleged by protestants. This omission amounted to $1,369,661 for the N&W and $56,382 for the Western District. However, it is respondent's contention that this omission would not have any measurable effect on the cost of any movement.

To refute the allegation that the RS type car was used by the majority of the Idaho potato and onion shippers in 1973 respondents introduce the following table to show that traffic handled in mechanical refrigerator cars has more than doubled in the last three years.

TABLE 4

Potato & Onion Shipments

Idaho

Year	RS Cars		RP Cars		Total	
	Shipments	% of Total	Shipments	% of Total	Shipments	% of Total
1972	24,478	76%	7,566	24%	32,044	100%
1973	15,735	57%	11,906	43%	27,641	100%
1974 (Dec. 1973 thru Nov. 1974)	8,729	40%	13,041	60%	21,770	100%

Further, respondents note that shipments moving in RS cars under bunker ice refrigerator service declined drastically in 1973 since such service was discontinued on September 2, 1973.

In reply to protestants argument concerning lack of seasonality, respondents contend that the Idaho potato and onion traffic has both a sharp and prolonged period of low volume (July-September) as well as a short-lived and distinguishable peak. For example, respondents state that based on a 12 month period ending November, 1974, the shipments in the peak month of January are 141 times the volume of the lowest shipping month July and there is also a large monthly variability in shipment volume.

Respondents aver that protestants' contention that the cost per car mile of an RS car is substantially less than for a mechanical refrigerator car, is misleading. Respondents indicates this statement is presumably based on the fact that RS cars are of a comparatively low value and are nearly fully depreciated. However, respondents believe that it is not proper to pick a costing period at a point in time when the required investment for the operation is almost fully depreciated, has reached its service life and is worn out. Therefore, if the continuation of the operation is

actually desired, as inferred, then the cost of continuing the the service must be considered. Respondents note that the average age of the RS car fleet is 20 years and the fleet condition has deteriorated to such a state that it must either be reconditioned or replaced. To provide a general overhaul would cost as much as $20,000 per car at current prices. Respondents estimate based on a PFE study, that it would cost $30,900 to acquire at today's prices a standard 33 foot inside length RS car. This figure compares to the $38,400 cost (structure only) for a new 51 foot mechanical refrigerator car.

Respondents state that there is no basis for protestants applying ICC variability factors to its car line costs. Just because the car line and railroad accounting systems are prescribed by the Commission does not mean that the accounts are similar. Moreover, the Commission has never included car line expenses in its variability studies indicating their accounts are not compatible with railroad accounts. In fact, the Commission has traditionally held that car line expenses are 100 percent variable stating as late as 1970:

> "We agree with the respondents, however, that these (car line) costs should be regarded as 100% variable . . ." (335 ICC 818)

Therefore, respondents maintain that it is improper to apply any variability factor lower than 100 percent to the expenses of a car line company which is what protestants have done.

Respondents also take exception to protestants restating the mileage costs from 7.0605 cents per mile to 7.0457 cents per car mile. This restatement was based on protestants adjusting upward the number of cars in service on the FGE in 1973 from 2,676 as shown by respondent, to 2,826. However, respondents state that the FGE had only 2,676 cars

in service for the full year 1973 and the 150 cars in question were acquired by FGE during 1973.

Thus, respondents contend that the mileage divisor and ownership costs used to compute the cost per car-mile in its study were based on the same units in service for the entire year 1973. To adjust upward the number of cars in service and the mileages, as protestants have done, without any corresponding increase in the value of equipment is improper.

Respondents argue that there is no merit to protestants' claim concerning the increase in labor and material costs used in developing the refrigerator car costs. It is respondents' contention that the use of 4,977 percent based on union employee wage increases to increase the labor expenses of officers and non-union personnel, which protestants object to, actually understate such costs. Respondents indicate this is because the wages paid to officers and other non-union personnel increased an average of 6.21 percent over the 1973 to April 1, 1974 period and by excluding this factor it has understated PFE car costs rather than overstating the costs. Furthermore, respondents maintain that the 17.1 percent factor used to increase material costs was computed properly. This factor was determined by comparing the simple average of the AAR's 1972 quarterly indexes of spot prices for railroad materials to the index of spot prices as of April 1, 1974 and by far the heaviest weights were given to iron and steel products and miscellaneous products with forest products being given very little weight. Moreover, respondents indicate car lines do purchase forest products for floor rack, interior linings sub-flooring and ties.

Respondents also claim that the contention that mechanical cars would be more active once icing services have been eliminated has not been shown. For example, in 1973 PFE mechanical cars experience the greatest activity of their history, running an average 11.2 trips. This compares to activity of recent years:

Year	Average Number of Trips
1972	10.5
1971	9.7
1970	10.6
1969	10.9
1968	10.7

Since the utilization experienced in 1973 is greater than would be expected for a normal year, the refrigerator car costs developed for 1973 are likely below the normal average cost level. As a result, any adjustment in 1973 mechanical car utilization in order to reflect a change in productivity should be a downward adjustment.

Respondents state it is puzzled by protestants' claim that meat hooks were included improperly in the refrigerator car investment account on the PFE since the replacement of meat hooks are supposed to be charged to the refrigerator car repair accounts. Respondents maintain there were no costs for meat hooks included in PFE's investment account or any operating expense account for 1973. Nor were any meat hooks replaced in 1973 on the PFE, so respondents indicate there should be no charges to the repair expense account.

In response to protestant's criticism that the State of Idaho was treated improperly as a single origin respondents indicate that the proposed rates from Idaho are "group to point rates" with each origin group comprising a relatively small geographical area. Respondents argue it had neither the time nor the data to develop "group to point costs" and as a result elected to treat Idaho as a single origin with costs calculated to each destination state. Further, respondents note that Eastern and Central Idaho originated the bulk of the issue movements with Western Idaho originating less than 13 percent of the total move-

ments. Since Eastern and Western Idaho are only two hundred miles apart, respondents contend the costs from one Idaho origin is proper representation of both. Finally, respondents state that the rate differential between Eastern and Western Idaho are predicated on market conditions and cost is not a factor.

Respondents state that the criticisms directed at its development of an April 1, 1974 inflation factors is unwarranted. First of all, respondents note the method of computation is consistent with the ICC approach set forth in Statement No. 2-58, *supra*. Secondly, there is no convenient way to reflect possible changes in traffic volume, method of operation, reduction in the labor forces and reduced consumption of fuel or materials and supplies as protestants would want reflected.

Respondents argue that there is no merit to protestants' contention that the loss and damage costs on the Idaho traffic is overstated. Respondents indicate that the fact remains that there is no way of separating the loss and damage experience for any single movement of traffic. Further, the claim experience of the Union Pacific alone as used by protestants is not representative of all carriers handling the Idaho potato and onion traffic. This is because the Union Pacific terminates very little of the traffic it originates. Moreover, respondents note the Eastern carriers who terminate this traffic, have the highest loss and damage claim experience. Thus, there would be every reason to suspect a higher loss and damage payout rather than a lower ratio.

In reply to protestants argument that the car ownership costs should be based on PFE's ownership experience since PFE supplies most of the mechanical cars, respondents contend it would not be proper to give special treatment to the Idaho potato and onion traffic. If this were the case, the same principle would apply to all traffic, i.e., the average costs for each type of car could no longer be accepted. In-

stead the operating costs for each car by owner would be needed and such car costs weighted according to the participation of each owner. Further, respondents state the empty return associated with a particular car fleet would have to be used.

Respondents take exception to protestants' contention that the rates at issue should include the recent 10 percent rate increase granted by the Commission in Ex Parte 305-A, *supra*. This is because the 10 percent increase was primarily intended to cover deferred expenses and capital investment which by definition could not appear in the reported costs. Therefore, respondents contend, the Ex Parte 305-A, *supra*, rate level is not a proper basis of comparison with costs.

CONCLUSIONS

Development of Costs

Respondents' application of the Commission's Rail Form A Formula to the expenses and statistics of the individual railroads cannot be authenticated since the Rail Form A results are not part of the record. While protestant Colorado Potato Growers Exchange, et al. argues that the formula application made on a number of railroads contained some fundamental errors the protestants did not show the effects these alleged errors would have on respondents' cost study nor are we able to determine the extent these errors would have on the cost study. Since we do not have the underlying work papers, which were available to protestants, we are not able to verify these alleged errors.

We agree with this protestant that respondents overstated for eight railroads the working capital as it pertains to the computation of the cost of capital in Rail Form A. The correct working capital shown by protestant was derived from an internal Commission Form No. ACV-107 revised. While this Commission form does not set forth in

detail the computation of the working capital, the railroad working capital is nevertheless determined in accordance with the general rules described in *Northampton and Bath Railroad Company*, 149 I.C.C. 244-263. In that case cited, the Commission approved a method for determining from a carrier's operating experience the desirable amount of working capital needed by it in its common-carrier operations. Moreover, this decision indicated that the computed working capital shall not exceed the carrier's investment in cash, material and supplies (less scrap and obsolete) and U.S. treasury notes and bills.

We also decline to adopt respondents' position that temporary cash investments should be included in the calculation of working capital. In this regard the above decision indicated that cash and temporary investments on hand as shown on the balance sheet is not truly indicative of the invested cash used in common carrier service. These balances may include cash that is held and intended for purposes other than those connected with the operation of the railroad, such as the payment of interest upon debt, dividends upon the stock, for additions to the property, and other such non-operating purposes.

It may include money which has been already allotted to some purpose which is represented in other items of the account. The use of the whole sums of cash on hand as a part of the working capital would result in an overstatement of the values devoted to common carrier service.

Adequate cash working capital is not indicated by the cash balance on a fixed date, nor by the average of balances on a series of dates but by comparison of the receipts and payments of cash in volume and frequency arising out of common carrier service. This is determined by a comparison of the total current operating liabilities with the total current operating assets.

The amount of cash on the balance sheet, therefore, is given consideration only to the extent that the ultimate

finding of working capital, including materials and supplies, shall not exceed the carrier's investment in cash, material and supplies and U.S. treasury notes and bills.

Thus, respondents have overstated the working capital of eight railroads which results in a slight overstatement of the Rail Form A unit costs developed by respondents for these roads. The effect of this overstatement on respondents' cost study, however, cannot be determined for the reasons stated above.

We agree with respondents that their failure to deduct accrued depreciation of lessor companies of the N&W and in the Western District would not likely have any measurable effect on the costs of any particular movement. However, we are unable to explain how protestant arrived at an overstatement for the N&W of $27,760,474 when respondents show this overstatement amounted to only $1,369,661. The lack of underlying work papers does not enable us to determine the reason for this difference.

Although not refuted by respondents the combining of the expenses and statistics of the BN and the MILW into one Rail Form A application, as alleged by protestant, would be improper. We are unable to determine because of a lack of work papers if respondents combined the two railroads for costing purposes. Nor are we able to determine the extent this possible error would have on respondents' cost study. Further, we are unable to determine if an error exists in the Rail Form A application of the Texas-Mexican since as noted above the individual carrier's Rail Form A's are not part of the record.

Notwithstanding the foregoing, it appears that the above errors noted by protestant would only slightly overstate the Rail Form A unit costs developed by respondents.

Updating Procedure

Respondents' indexing procedure used to update the 1973 costs to an April 1, 1974 level based on the Commission's Statement No. 2-58 *supra,* is an acceptable method of updating costs.

Several protestants argue that the method of updating costs as outlined in Statement 2-58, *supra,* is not valid. Furthermore, they contend the index factor in the Southern Region was computed in a slightly different manner than those for the Eastern and Western Region. A review of respondents' calculations, which were submitted, indicate no abnormalities in the method of computation for the three regions. All three indexes were computed in the same manner and conform to the Commission's 2-58 procedure. The slight differences noted by protestants in wage divisions between the three regions is to be expected. No discrepancies in the method of computation between the three regions was detected.

As to protestant's contention that the above procedure fails to consider changes in traffic volume, service units, etc., it should be noted that this procedure was not designed to take into account such changes. Instead the procedure was designed to reflect different cost levels only and assumes that all things remain equal. It is therefore incumbent upon protestants and respondents to adjust these index factors to take into consideration productivity changes and other elements effecting the cost update ratio, which none of the parties has done.

Traffic Study

Respondents did not submit the results of its traffic study. The study based on a 10 percent sample of all perishable shipments handled in 1973, by 6 railroads reported to have originated 98 percent of ths issue traffic, appears to be representative of all perishable traffic as a whole. Moreover, protestants did not question the validity of the traffic

study, only the manner in which it was weighted to compute average costs for so called average hauls.

Cost Study Results

Respondents' mechanical refrigerator cost study show costs for various so-called average movements broken down by commodity groupings and destination rate groups. These average movements reflect costs based on weighted averages, i.e., weighted originations, weighted average miles, weighted average number of interchange and were calculated according to each railroads amount of participation in the issue traffic based on the 10 percent waybill sample.

Instead of computing costs in the above manner, it would have been preferable to have costed out each individual movement as reflected by the waybill sample. This method would have been more desirable as it would produce costs for each individual movement (reflecting each movements transportation characteristics) which could in turn be compared to the actual revenue generated by each movement, as shown on the waybill.

Moreover, respondents' application of Rail Form A unit cost to the weighted average traffic data is questionable. Rail Form A develops four basic unit costs: cost per car-mile, cost per ton-mile, cost per carload and cost per ton. Respondents' application gives effect to carload and car-mile costs (i.e., the percentage distribution of carloads and car-miles were developed) and presumably the distribution was applied to the terminal and car-mile costs but overlooks the effect of tons and ton-miles (i.e., the percentage distribution of tons and ton-miles were not computed). Again, presumably the carload and car-mile distribution was used to develop these costs. Failure to account for the ton and ton-mile distribution of the participating traffic presents a serious deficiency in respondents' method of costing. As a result the corresponding costs will be understated or overstated depending on respondents' method for allocating ton and ton-mile (which method is unclear).

Additionally, respondents developed costs at various minimum weight categories which would be acceptable if the average load of this traffic and the minimum weight categories were equal. However, respondents have not shown this to be true. Accordingly, this oversight presents a deficiency in respondents' presentation. It is our view that costs should be developed at the actual weight of the traffic, for it is the actual weight carried, that effects costs not the tariff minimum weight that should be carried.

The most glaring deficiency in respondents' cost study is that the rates are based on so-called "representative origin points". That is, respondents in developing the rates at the April 1, 1974 level for its revenue-cost comparisons, did not develop a weighted average of the rates from all origin points to each destination state, but instead selected a rate based on an arbitrary origin city for each of the 9 origin groups shown. In developing costs, however, respondents combined and averaged all of the shipments from the 9 origins used, in order to obtain the cost of an average movement. As such, these movements reflect costs based on weighted averages.

Therefore, to compare revenues based on a specific origin rate with the costs based on weighted averages is improper. Respondents have not shown that the rates it has selected are representative of all the rates from the nine origin groups to the destination points shown.

This is why it would have been preferable to have used the actual revenues from the 10 percent waybill sample. Respondents developed weighted average costs based on this waybill sample and could just as easily have developed weighted average revenues.

Another deficiency noted in respondents' cost study is that no consideration was given to either multiple-car or

trainload shipments. There has been considerable testimony introduced in this proceeding which indicates some movements of perishables are handled in large blocks and in run through train service. Moreover, respondents have indicated that the perishable traffic is seasonal in nature, especially the Idaho potato and onion traffic. This observation is supported by respondents' rebuttal testimony in Exhibit No. 184, where respondents discuss the seasonality of Idaho potato and onion traffic. Respondents show in this Exhibit a breakdown of potato and onion shipments by months. For the month of December, 1973 and January, 1974, respondents show 3,046 and 3,660 shipments were handled respectively. Since it has been brought out in other testimony that the Union Pacific is the sole originator of the Idaho potato and onion traffic, this would mean that this railroad is handling over 100 cars a day for the above two months and it is not likely that there are 100 single shipments from 100 different origins handled each day. Thus it would appear almost certain that at least some of the traffic is being handled either in multiple-car or trainload movements.

By computing costs solely on a single-car basis, respondents have overstated its costs to the extent that some of the perishable traffic moved in multiple-car and trainload movements.

In developing the variable costs shown in Exhibits 35 and 39 for the various size net loads, respondents failed to include any way train costs for the applicable way train miles that would be incurred by most movements. Thus respondents' use of only the through train costs slightly understates the line haul costs by excluding the higher way train costs.

Car Ownership Costs

Several protestants have criticized respondents' development of car ownership costs for a number of reasons. Foremost among these reasons is that respondents failed to include the lower ownership costs of the RS type bunker cars. Respondents' failure to consider ownership costs associated with the RS cars is a major deficiency in its cost study. Respondents' rebuttal that the ownership costs should be based on the costs of continuing the service rather than what the costs were in the past is fallacious. Such a statement is contrary to sound cost finding principles. The fact remains that the cost study was based on 1973 operations, therefore, the study should reflect the cost of the actual 1973 operations, not the costs of some operations that may occur in the future. Moreover, it should be pointed out that while the railroads discontinued icing service in RS type cars in September, 1973, the railroads will continue to provide ventilation service in RS cars and icing of these cars will also continue in those instances where the shippers themselves perform the icing of the cars.

Respondents' failure to include the lower costs associated with the RS cars overstates the costs shown in Exhibits 35 and 39. This is especially true with respect to the Idaho potato and onion traffic. Respondents' own figures in Table 4 herein shows that RS cars handled 57 percent of the Idaho potato and onion traffic in 1973 and 40 percent of the traffic for the year ending November, 1974.

As a hypothetical example of how the cost study results would be overstated: suppose that the ownership costs of an RS car is 5 cents per car mile [1] in comparison with the mechanical refrigerator car cost of 7.0605 cents per car mile used by respondents in their cost study. For a movement of potatoes between Idaho and New York, a distance of approximately 2,500 miles, the RS car ownership costs would be $125 per car and the mechanical car ownership

[1] It would appear that even the estimated cost of 5 cents per car mile for ownership costs of the RS type cars would be overstated since, as noted by respondents, these RS type cars are almost fully depreciated.

costs would be $177 per car, a $52 per car difference, without considering empty return and overhead. Thus the relative importance of computing car ownership on the right basis can be seen—a mere 2 cents per car mile makes a $52 per car difference in the above noted hypothetical example. On a 60,000 pound shipment this would make a difference of 8.7 cents per cwt. and on an 80,000 pound shipment a difference of 6.5 cents per cwt.

In addition, we agree with protestants that it would have been preferable to have used PFE's mechanical refrigerator car costs for the Idaho potato and onion traffic since PFE reportedly furnished 100 percent of the cars for this traffic in 1973. Therefore, respondents' costs in Exhibits 35 and 39 for this traffic are overstated to the extent that they are based on 5 carlines average ownership cost of 7.0605 cents per car mile and the PFE's costs as shown by respondents is 6.6546 cents per car mile. Respondents' rebuttal that it would be improper to use specific ownership costs for the Idaho potato and onion traffic without applying the same principle to the other traffic, is not valid. Since the PFE reportedly provides all of the mechanical refrigerator cars for the Idaho potato and onion traffic their car ownership costs should be used exclusively.

In the case of the remaining perishable traffic is would have been more appropriate to have weighted the ownership costs according to the participation of each owner (rather than the simple average cost of the 5 carlines as used by respondents). However, this may have been impractical from the standpoint that several carlines provided cars for this remaining traffic rather than one carline exclusively. As a result an average car ownership cost based on the carlines providing the cars may be more desirable.

The restatement of respondents' car ownership costs (by one protestant) based on the percent variability factors

shown in the Commission's Statement 1C1-72, *supra,* is improper. The factors in Statement 1C1-72, *supra,* are applicable to the operating expenses of the railroads, not the operating expenses of carline companies. Moreover, the Commission as traditionally held that the expenses to the railroads for leasing cars from the carline companies are 100 percent variable (335 ICC 818).

Sample Aggregation

Respondents' rebuttal on treating Idaho as a single origin is not persuasive. We agree with protestants that it would have been preferable to have divided Idaho into three origin groups, Eastern, Western and Central rather than treating Idaho as a single origin for costing purposes. There has been considerable testimony that the transportation characteristics in each of these three areas are different. More important, however, is that the record shows the rates from Eastern and Western Idaho differ by as much as 8 cents per hundredweight. While market considerations may be a factor, such differences in rates would nevertheless have an effect on the revenue to cost comparisons shown in respondents' cost study. Moreover, we take exception to respondents' contention that the proper data was not available to develop group to point costs. Not only was this data available from the 10 percent traffic sample, enough data was available to respondent to permit it to cost out each individual shipment in the traffic sample and to compare such costs to the actual revenue reflected on the waybill.

Loss and Damage

We disagree with one protestant group's argument that the loss and damage experience of the Union Pacific should be used in lieu of that shown by respondents, since the carrier is the sole originator of Idaho potato and onion traffic. Respondents have correctly pointed out that this would be

improper because some portions of the potato and onion claims are paid by the connecting Eastern railroads which terminate this traffic. However, the development of the loss and damage by respondents is questionable. The six Western railroads (UP, SP, BN, Santa Fe, and MP) used by respondent in computing loss and damage have not been shown to be representative of the loss and damage claim experience of the connecting Eastern Railroads. In this regard, we agree with another protestant group that a more accurate method would have been to use the loss and damage experience maintained by the AAR for fresh fruits and vegetables by commodity. It should be noted that loss and damage costs for potatoes other than sweet are reported in the Commission Statement No. 1C1-72, *supra,* based on figures furnished by the AAR. Protestants did not show what the proper loss and damage would be since this information was reportedly not available to protestants.

Tare Weights

Protestant's criticism that the use of an average tare weight of 863 cwt based on mechanical cars designated RP and RPL in computing all car mile costs discriminate against lower minimum weight shipments which use a smaller car, has some merit. It would have been more appropriate for respondent's to use the average tare weight of the cars handling each commodity. For example, the average tare weight of the cars used for the 1973 citrus loadings, shown by respondents, was 675 cwt. Additionally, protestants have pointed out that, different size cars handle different types of perishable traffic; thus the different tare weight of the cars should be taken into consideration in costing out these movements.

Interchange Switching

Protestants' criticism of respondents' interchange switching costs is questionable. Protestants' allegation that

switching at interchange is normally handled in large blocks of cars does not necessarily mean that less switching is required than the system average time shown in Rail Form A. It should be noted that the system average time in Rail Farm A also reflects, to some degree, blocks of cars being switched at one time.

As to protestants' contention concerning run through trains, we agree that on these movements the interchange switching costs should be reduced or virtually eliminated depending on the operation involved. Not enough information has been shown, however, to enable us to measure the effect this possible reduction would have on respondents' cost study.

Inter and Intratrain Switching

With respect to inter and intratrain switching, we agree with protestants that it would have been desirable to have included such costs based on the actual number of switches rather than on the basis of car miles. Presumably respondents could have developed this information in the same manner as it developed its actual number of interchanges for each movement. However, we do not believe this is a critical issue. The mere fact that protestants make note of a few instances where inter and intratrain switching occurs is not sufficient to warrant the conclusion that the total movement of perishable traffic differs from the average inter and intratrain switching costs on a mileage basis.

Level of Rates

We agree with protestants that respondents should have given consideration to the 10 percent rate increase granted on June 20, 1974 in Ex Parte 305-A, *supra.* The justification for this increase was based, *in part,* on cost increases as of April, 1974 as noted by protestants. While the entire 10 percent increase applies on the rates in question (barring holddowns) we recognize respondent's point that a

large portion of this increase was intended to cover deferred maintenance and capital investments. Specifically, the Commission directed that 7 percent of the 10 percent rate increase be used for deferred maintenance and delayed capital improvements and the remaining 3 percent to cover increases in materials and supplies.

Nevertheless, based on the above, the rates in question should be increased 10 percent. It is immaterial how this 10 percent increase is to be used since the rate increase still applies to the rates in question. Moreover, the deferred maintenance which the 7 percent is intended to recover, is the responsibility of the perishable traffic as well as all other traffic.

Thus, the revenues shown by respondents in their revenue cost comparisons are understated since they do not include the above 10 percent increase.

TOFC Costs

Many of the above noted criticisms also apply to respondents' TOFC cost showing. For example, those discrepancies found in the development of the unit costs under Rail Form A: the unclear method of allocating of ton and ton-mile costs: the failure to develop loss and damage costs by commodity, and the failure to give effect to the recent 10 percent increase in Ex Parte 305-A, *supra*, all would have an effect on respondent's revenue to cost showing. However, with the exception of the development of Plan II¼ trailer rental costs, respondents have shown none of the Rail Form A nor special study unit costs used to develop its line-haul, terminal and interchange costs. As a result, we are unable to determine the extent the above discrepancies would have on respondents' costs. The application of the Ex Parte 305-A, *supra*, increase would, of course, increase the rates 10 percent.

Respondent's development of its trailer rental costs based on the current purchase price of a 40 foot refrigerator trailer less the refrigeration unit, is not acceptable. The Commission has never recognized the theory of "current costs new". Moreover, respondents have not explained nor supported the application of a 10 percent cost of capital to the current purchase price of equipment.

Protestants' Cost Evidence

Protestants' cost evidence is limited to various restatements of respondent's cost study. We are unable to verify any of the restatements shown by protestants since underlying work papers were not submitted. However, a review of the data which were included in the record of this proceeding indicate these restatements are fraught with deficiencies and assumptions which render these restatements, for the most part, of little value. The following are some examples of these deficiencies and improprieties:

Protestants, Idaho Potato Commission, et al., restated respondent's costs to reflect PFE's ownership costs for mechanical refrigerator cars and Union Pacific's intertrain and intratrain switching costs based on the number of reported switches. This restatement which applies only to the Idaho potato and onion traffic is suspect in light of our above comments concerning inter and intratrain switching. That is, the mere fact that protestants make note of a few instances where inter and intratrain switching occurs on the Union Pacific is not sufficient evidence to justify a restatement of respondent's costs based on the number of switches incurred on the Union Pacific.

Protestants', Colorado Potato Growers Exchange, et al., restatement of respondents' costs is based on unsupported and unverifiable assumptions. For example, protestants adjusted intertrain switching costs based on the assumption that one switch occurs each 800 miles in the West and

one switch each 600 miles in the East and South. Further, there is no basis for protestants' reducing respondents' interchange switching costs to reflect 50 percent of the system or regional average in the West and 75 percent for the East and South. Protestants' elimination of train supplies and expenses from the Rail Form A costs is also improper. Although the cost of cleaning of the refrigerator cars is included in train supplies and expenses (annual report, Account 402) there are other items of expense such as the costs of produce inspectors, police protection, etc., that are included in this account. Thus, protestants' contention that train supplies and expenses should be eliminated since the cost of cleaning the refrigerator cars is included in the car mile costs is invalid. Only that portion relating to car cleaning should be eliminated. As noted previously, protestants' adjustment of respondents' car ownership costs based the percent variability facts shown in the Commissions Statement 1C1-72, *supra,* is improper.

Protestant, Red River Valley Potato Growers Association, restatement was based on an unexplained mileage adjustment and an unsupported tare weight of 596.5 cwt. Further, this protestant has not shown that the 5.9830 cents per car mile it uses to restate costs based on WFE's car ownership costs, is representative of the car ownership costs of all carlines providing perishable equipment.

SUMMARY

Respondents' mechanical refrigerator car cost study was developed on two different bases, that is, (1) on a so called "pure Rail Form A variable cost basis" and (2) Rail Form A variable costs including depreciation of car and locomotive valued on a reproduction cost basis and a 13 percent rate of return after taxes on that equipment. The first basis, which is presently used by the Commission for cost purposes, allows for a cost of capital based on original cost less depreciation with the rate of return based on the actual interest rate the rail carriers are currently paying on their existing debt. This basis which respondents have utilized in its Exhibit 35 cost showing has long been recognized by the Commission as a proper basis for computing variable costs.

Respondents' cost study is deficient for the following reasons:

(1) Repsondents have not shown that the rates used in its revenue to cost comparisons are representative of all the rates between the origin groups and destination points shown in its cost study.

(2) Respondents have failed to increase its present and proposed rates to reflect the 10 percent rate increase granted on June 20, 1974 in Ex Parte 305-A, *supra.*

(3) Respondents have failed to include in its cost study the lower car ownership costs associated with the RS type bunker cars.

(4) Respondents have given no consideration to the movement of perishable traffic in either multiple-car or trainload movements.

(5) Respondents have used an average tare weight based on all mechanical cars designated RP and RPL which is not applicable to traffic handled in RS cars and smaller mechanical refrigerator cars.

(6) Other discrepancies as noted herein.

Respondents' Exhibit 35 reveals the following number of present revenues exceeding variable cost excluding the 13 percent cost of capital. Of the total 784 cost/rate comparisons shown, 561 or 72 percent of the present rates exceed variable costs (excluding the 13 percent cost of capital).

We are unable to restate respondents' costs because the basic traffic and cost study data and other pertinent supporting detail were not made part of the record. However,

if the *present rates* as shown by respondents in Exhibit 35 are restated to include the 10 percent rate increase granted in Ex Parte 305-A, *supra*, and these restated rates then compared with respondent's variable costs (excluding the 13 percent cost of capital), the following changes would result: The number of restated present rates exceeding variable costs (excluding the 13 percent cost of capital) increases from 561, to 702. In other words 90 percent of the restated present rates exceed variable costs excluding the 13 percent cost of capital.

With respect to respondent's TOFC costs shown in Exhibit 62, the costs for Plan II¼ were improperly computed. The development of trailer rental costs based on the current purchase price of a refrigerator trailer is not acceptable. Further respondents have not supported the 10 percent cost of capital applied to current purchase price of the equipment. However, we are unable to restate these costs for the same reasons stated above. Nevertheless, if the 10 percent increase granted in Ex Parte 305-A, *supra*, was applied to the TOFC rates then the present rates would exceed the Plan III variable costs in all instances by substantial amounts. Further, the present rates if increased 10 percent would exceed the Plan II¼ variable costs, even as overstated by respondent as explained above, in all but a few instances.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 5-201

THE ATCHISON, TOPEKA AND SANTE FE RAILWAY COMPANY, ET AL., *Plaintiffs*,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants*,

BLUE CHIP, INC., ET AL., *Intervening Defendants*

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that The Atchison, Topeka, and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; Robert W. Blanchette, Richard C. Bond and John H. McArthur, Trustees of the property of Penn Central Transportation Company, debtor; Burlington Northern, Inc.; the Chesapeake and Ohio Railway Company; Chicago Rock Island and Pacific Railroad Company; The Denver and Rio Grande Western Railroad Company; Thomas F. Patton and Ralph S. Tyler, Jr., Trustees of the property of Erie, Lackawanna Railway Company, debtor; Norfolk and Western Railway Company; Southern Pacific Transportation Company; Southern Railway Company; St. Louis Southwestern Railway Company; the Texas and Pacific Railway Company; Union Pacific Railroad Company; and Western Pacific Railroad Company, plaintiffs herein, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on the 24th day of November, 1975. This appeal is taken pursuant to Sections 1253 and 2101 of the Judicial Code, 28 USC, § 1253 and § 2101.

Dated at Philadelphia, Pennsylvania, this 15th day of January, 1976.

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